TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, PETITIONER,

vs.

BENJAMIN F. JONES ET AL. AND SOSMAN AND LANDIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1899.
CERTIORARI AND RETURN FILED MARCH 16, 1899.

(17,296.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the southern district of Ohio	1	1
Caption	1	1
Bill of complaint	1	1
Exhibit A—Contract to furnish steel, December 13, 1894	10	8
B—Statement of account, March 21, 1896	10	9
Subpœna to hotel company	12	11
Subpœna to Wm. J. McClain	13	11
Appearance of certain defendants	15	13
Marshal's return	15	13
Marshal's return	16	14
Appearance of hotel company	17	14
Demurrer of hotel company	17	15
Order filing answer and cross-bill of Sosman & Landis	18	16
Answer and cross-bill of Sosman & Landis	19	16

	Original.	Print.
Exhibit A—Contract between Wm. J. McClain and Sosman & Landis, February 28, 1895	25	21
B—Statement of account, June 5, 1896	26	22
Opinion on demurrer	31	26
Demurrer to answer and cross-bill of Sosman & Landis	38	31
Decree	39	32
Petition for appeal by Jones *et al*	40	33
Assignment of errors by Jones *et al*	41	34
Petition for appeal of Sosman & Landis	41	34
Assignment of errors by Sosman & Landis	42	35
Order allowing appeal of Sosman & Landis	43	35
Order allowing appeal of Jones *et al*	43	36
Bond on appeal of Jones *et al*	44	36
Bond on appeal of Sosman & Landis	45	37
Clerk's certificate	46	38
Citation on appeal of Jones *et al*	47	39
Citation on appeal of Sosman & Landis	48	40
Appearance for Jones *et al*	50	41
Appearance for Sosman *et al*	50	41
Telegram from counsel to clerk	51	42
Hearing and submission	52	43
Decree on appeal of Jones *et al*	52	43
Decree on appeal of Sosman *et al*	53	43
Opinion	54	44
Clerk's certificate	79	66
Writ of certiorari	80	67
Return to writ of certiorari	81	67
Stipulation as to return	81	68

a

Nos. 535 and 536.

United States Circuit Court of Appeals, Sixth Circuit.

BENJAMIN F. JONES ET AL., Appellants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL CO., Appellee.

SOSMAN & LANDIS, Appellants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL CO., Appellee.

Appeals from the circuit court of the United States for the eastern division of the southern district of Ohio.

Original transcript filed July 13, 1897.
Filed Aug. 3, 1897.

FRANK O. LOVELAND, *Clerk.*

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* ss:

At a stated term of the circuit court of the United States of America, within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of June, being also the first *Tuesday* day of that month, in the year of our Lord one thousand eight hundred and ninety-seven and of the American Independence the one hundred and twenty-first.

Present: The Honorable George R. Sage, district judge.

Among the proceedings had were the following, to wit:

JONES AND LAUGHLINS, LIMITED, Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF Hotel Company and Others, Defendants.
No. 796. Bill of Complaint.

Be it remembered that heretofore, to wit, on the 9th day of January in the year of our Lord one thousand eight hundred and ninety-seven, came the complainants by their solicitors and filed in the clerk's office of the court aforesaid their certain bill of complaint herein clothed in the words and figures following, to wit:

Bill of Complaint.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

Bill of Complaint.

To the honorable judges of the circuit court of the United States for the southern district of Ohio, eastern division, sitting in equity:

2 BENJAMIN F. JONES, GEORGE M. LAUGHLINS, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., Doing Business under the Firm Name and Style of Jones & Laughlins, Limited, Having Their Principal Office and Place of Transacting Business in the City of Pittsburgh and State of Pennsylvania, Bring This Their Bill of Complaint, Complainants,

vs.

THE GREAT WESTERN FIRE PROOF HOTEL COMPANY, a Corporation; William J. McClain, The Grand Rapids School Furniture Company, a Corporation; Daniel W. McGrath, Taylor, Beall a- Company, a Partnership; The Akron Hydraulic Press Brick Company, a Corporation; The Fish Stone Company, a Corporation; The Fish Press Brick Company, a Corporation; Sturgeon, Ford & Company, a Partnership; The Decorative Art Company, a Corporation; Meacham & Wright, a Partnership; Sosman & Landis, a Partnership; Dundon & Bergin, a Partnership; The N. S. Tyler Wire Makers Company, a Corporation; James L. Clarke, The McHose & Lyon Company, a Corporation; William Caldwell, Charles A. Klie, The American Blower Company, a Corporation; Russell & Company, a Corporation; H. C. Johnson & Company, a Partnership; F. O. Schoedinger, Schoedinger, Fearn & Company, a Partnership; Thomas Paige, William White, L. Hiltgartner & Sons, a Partnership; F. Bert Milligan, Assignee of William J. McClain; Henry Caren, Receiver of the Firm of Dundon & Bergin; B. L. Chase, The United States Mortgage & Trust Company, a Corporation; E. F. Schaffer, Doing Business under the Name and Style of Shaffer Roofing Company. } No. 796.

And thereupon your orators complain and say:

3 First. That your orators are members of the limited partnership association doing business under the firm name and style of Jones & Laughlins, Limited, which said association is a limited partnership association organized under an act of the General Assembly of Pennsylvania, approved June 23, 1874, entitled "An act authorizing the formation of a partnership association in

which the capital subscribed shall alone be responsible for the debts of the association except under certain circumstances." Your orators are all of the members and shareholders of said limited partnership association, and have their office and principal place of transacting their business in the city of Pittsburgh and State of Pennsylvania; and said limited partnership association is, and at all times hereafter mentioned was, a citizen of the State of Pennsylvania.

The defendant, The Great Southern Fire Proof Hotel Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, William J. McClain, is a resident of the city of Columbus and State of Ohio, and is a citizen thereof.

The defendant, The Grand Rapids School Furniture Company, is a corporation organized and existing under and by virtue of the laws of the State of Michigan, and is a citizen thereof.

The defendant, Daniel W. McGrath, is a resident of the city of Columbus and State of Ohio, and is a citizen thereof.

The defendant, Taylor, Beal & Company, is a partnership doing business in the city of Columbus and State of Ohio, the individual partners thereof being William D. Taylor, James P. Beall and William J. Keever.

The defendant, The Akron Hydraulic Press Brick Company is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and is a citizen thereof.

The defendant, The Fish Stone Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, The Fish Press Brick Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, Sturgeon, Ford & Company, is a partnership doing business in the city of Columbus and State of Ohio, the individual partners thereof being unknown to your orators.

4 The defendant, The Decorative Art Company, is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and is a citizen thereof.

The defendant, Meacham & Wright, is a partnership doing business in the city of Columbus and State of Ohio, the individual partners thereof being Floras D. Meacham and Frank S. Wright.

The defendant, Sosman & Landis, is a partnership of Chicago, Illinois, doing business in the State of Ohio, the names of the individual partners thereof being unknown to your orators.

The defendant, Dundon & Bergin, is a partnership doing business in the city of Columbus, State of Ohio, the individual partners thereof being Thomas J. Dundon and Matthew J. Bergin.

The defendant, The S. N. Taylor Wire Makers Company, is a corporation organized and existing under and by virtue of the — State of Ohio, and is a citizen thereof.

The defendant, James L. Clarke, is a resident of the city of Columbus and State of Ohio, and a citizen thereof.

The defendant, The McHose & Lyon Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, William Caldwell, is a resident of the State of Ohio, and is a citizen thereof.

The defendant, Charles A. Klie, is a resident of the city of Columbus and State of Ohio, and is a citizen thereof.

The defendant, The American Blower Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, Russell & Company, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen thereof.

The defendant, H. C. Johnson & Company, is a partnership doing business in the State of Ohio, the names of the individual partners thereof being unknown to your orators.

The defendant, F. O. Schoedinger, is a resident of the city of Columbus, State of Ohio, and is a citizen thereof.

The defendant, Schoedinger, Fearn & Company, is a partnership doing business in the State of Ohio, the individual partners thereof being F. O. Schoedinger, W. A. Fearn and J. R. Dickson.

The defendant, Thomas Paige, is a resident of the city of Cleveland and State of Ohio, and is a citizen thereof.

The defendant, L. Hiltgartner & Sons, is a partnership doing business in the city of Columbus, State of Ohio, the names
5 of the individual partners thereof being unknown to your orators.

The defendant, William White, is a resident of the State of Ohio, and is a citizen thereof.

The defendant, F. Bert Milligan, assignee of William J. McClain, is a resident of the city of Columbus, State of Ohio, and is a citizen thereof.

The defendant, Henry Caren, receiver of the firm of Dundon and Bergin, is a resident of the city of Columbus, State of Ohio, and is a citizen thereof.

The defendant, B. L. Chase, is a resident of the city of Columbus, State of Ohio, and is a citizen thereof.

The defendant, The United States Mortgage & Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen thereof.

The defendant, E. F. Shaffer, is a resident of the city of Columbus, State of Ohio, and is a citizen thereof, doing business in the said city of Columbus, under the firm name and style of the Shaffer Roofing Company.

Second. Your orators further say that on the 13th day of December, 1894, they made and entered into a certain written contract with the defendant William J. McClain, a copy of which contract is hereto attached and marked Exhibit "A;" that said defendant William J. McClain for some time prior to and at said time was engaged as principal contractor for the defendant The Great Southern Fire Proof Hotel Company, in erecting and constructing for the said The

Great Southern Fire Proof Hotel Company, a six-story fireproof hotel and opera-house or theatre on the premises hereinafter described, under and by virtue of the certain written contract with said Great Southern Fire Proof Hotel Company, in which said contract the said McClain agreed and contracted as such principal contractor to construct and complete said fireproof hotel and opera-house, for said company, for the sum of $345,000. That by the terms of the said written contract made and entered into by your orators and the said defendant William J. McClain the terms of which contract are herein set out in Exhibit "A," it was provided that your said orators should furnish the said defendant William J. McClain with nine hundred tons of structural steel for the Great Southern Fire Proof Hotel Company, for the said hotel in the city of Columbus and State of Ohio, said structural steel to be fitted and ready for erection; said structural steel to be so furnished for the sum of $32,500, delivered f. o. b. cars Columbus.

Your orators further say that it was further provided in
6 said contract in an additional quantity of structural steel should be required by the defendant William J. McClain more than the nine hundred tons provided for in said written contract, your orators were to furnish the said William J. McClain with the said additional structural steel at the rate of $1.81 per one hundred pounds; that if an amount of structural steel less than the said nine hundred tons should be required by the said defendant William J. McClain for the purpose stated in said written contract, then your said orators were to allow the said William J. McClain a reduction from the said contract price for said structural steel at the rate of $1.81 per one hundred pounds, for the difference between the structural steel actually shipped and the said nine hundred tons provided for in said contract.

Your orators further say that it was still further provided in said contract that your said orators were to commence the shipping of said structural steel at once, and that the order for the same should be completed by your orators before the first day of August, 1895.

Your orators still further say that it was still further provided for in said written contract, that the payments to your said orators by the said William J. McClain for the structural steel provided for in said written contract were to be cash payments, the same to be made on the fifth day of the month following the shipment of said steel.

Third. Your orators further say that in pursuance of the terms and conditions of said written contract and in strict compliance therewith, your orators between the 16th day of April, 1895, and the 29th day of January, 1896, shipped to and furnished the said defendant William J. McClain with structural steel to the value of $43,296.74 as per an itemized account hereto attached and marked Exhibit "B," which said structural steel so furnished was all used in and about the construction of said Great Southern fireproof hotel and opera-house in the city of Columbus and State of Ohio. And your orators say that they have fully kept and performed all the terms and conditions of said written contract on their part to be kept and performed.

Fourth. Your orators further say that they have received from the defendant William J. McClain, on said written contract the sum of $31,886.72, leaving a balance still due your orators from said William J. McClain for materials furnished him, and labor performed for him under and according to the terms of said written contract, the sum of $11,410.02, with interest thereon from the 28th day of January, 1896.

7 Fifth. Your orators further say that on the 11th day of August, 1896, the defendant William J. McClain made and filed in the probate court of Franklin county, Ohio, a deed of assignment for the benefit of his creditors to F. Bert Milligan, assignee; that said William J. McClain is wholly insolvent and unable to pay the claims of his said creditors including the said claim of your said orators.

Sixth. That on the 21st day of April, 1896, at 4.50 o'clock p. m., within four months after having furnished said material and having performed said labor under and according to the terms of said written contract, your orators duly filed with the recorder of Franklin county, Ohio, an affidavit containing an itemized statement of the amount and value of said materials furnished and labor performed, according to the terms of said written contract between your orators and the said William J. McClain, with all credits thereon, together with a copy of said written contract with the said William J. McClain under which said written contract the said material was so furnished and the said labor was so performed; and also, a description of the premises upon which the said The Great Southern fireproof hotel and opera-house was situate, which said affidavit was thereafter recorded in Book No. 9, pages 99, 100 and 101, of the records of liens of said Franklin county, Ohio, and that upon said 2d day of April, 1896, there was due your said orators upon said account from the said William J. McClain the sum of $11,140.02 with interest thereon from the 28th day of January, 1896.

Seventh. Your orators further say that the said affidavit was so filed with the said recorder of Franklin county, Ohio, in compliance with the terms and provisions of section 3184 as amended April 13, 1894, and 3185 of the Revised Statutes of the State of Ohio.

Eighth. Your orators further say that the premises upon which said fireproof hotel and opera-house building is located are in the county of Franklin, State of Ohio, and in the city of Columbus, and bounded and described as follows:

In lots Nos. 352, 353 and 354, said premises being 187½ feet square, bounded on the north by Main street, on the east by Pearl street, on the south by Noble street, and on the west by High street, in the city of Columbus and State of Ohio.

Ninth. Your orators further say that the material so furnished and the labor so performed in accordance with the terms and conditions of said written contract between your orators and the

8 said William J. McClain constituted a part of the improvement provided for in the contract between the said William J. McClain, the principal contractor, and the said defendant, The

Great Southern Fire Proof Hotel Company, for the erection of said building, and that the same was and is a part of said building.

Tenth. Your orators further allege that by reason of the premises their said claim became a valid and subsisting lien of the said The Great Southern fireproof hotel and opera-house, and the tract of land on which the same is situated and heretofore described, from the 17th day of April, 1895, the date when said labor was commenced, and said materials furnished, for the sum of $11,140.02, with interest thereon from the 28th day of January, 1896, the amount now remaining due and unpaid upon your orators' said claim from the said defendant, William J. McClain.

Eleventh. Your orators further say that the said opera-house or theater in said building was completed on or about the 15th day of September, 1896, since which time the defendant, The Great Southern Fire Proof Hotel Company, has been and is now receiving as annual rental therefor, the sum of $6,500, payable in monthly installments of $541.66⅔ each; that all of the store-rooms in said building are now completed, and all have been leased to various parties and are now occupied by the said parties at annual rentals, the amount of which is unknown to your orators; that said hotel building is now completed, and that the said defendant, The Great Southern Fire Proof Hotel Company, is negotiating with and about to lease the same to parties, the names of which are unknown to your orators, and the annual rent to be paid for the same by said parties is also unknown to your orators.

Twelfth. Your orators further say that the property heretofore described is probably insufficient to pay the encumbrances thereon, and the appointment of a receiver for the collection of all of the said rents therefrom is necessary for the protection and preservation of the rights of your orators herein, and all other lienholders thereof.

Thirteenth. Your orators further say that the defendants, William J. McClain, The Grand Rapids School Furniture Co., Daniel W. McGrath, Taylor, Beall & Company, The Akron Hydraulic Press Company, The Fish Stone Company, The Fish Press Brick Company, Sturgeon, Ford & Company, The Decorative Art Company, Meacham & Wright, Sosman & Landis, Dundon & Bergin, The N. S. Taylor Wire Makers' Company, James L. Clarke, The Mc-
9 Hose & Lyon Company, William Caldwell, Charles A. Klie The American Blower Company, Russell & Company, H. C. Johnson & Company, F. O. Schoedinger, Schoedinger, Fearn & Company, Thomas Paige, William White, L. Hiltgartner & Sons, F. Bert Milligan, assigned of William J. McClain; Henry Caren, receiver of the firm of Dundon & Bergin; B. L. Chase, The United States Mortgage & Trust Company, E. F. Shaffer, doing business as The Shaffer Roofing Company, and each claim to have some interest in the said property of the defendant, The Great Southern Fire Proof Hotel Company, as lienholders or otherwise, the exact nature and extent of which interest your orators are not now advised, and cannot therefore more definitely state.

And therefore your orators pray that the said defendants may be required to answer herein and to fully set forth their respective

claims in the premises and in any default thereof they may be forever barred from asserting any claim whatsoever against said property or any part thereof.

Wherefore your orators respectively pray that a receiver may be appointed herein by your honors to collect all of said rents from the completed portions of said building, so rented as aforesaid, and also all rents which may hereafter accrue by reason of any new leases granted by the said hotel company, and that said receiver be ordered to hold said moneys so collected, subject to the order of your honors herein; that the said claim of your orators against the said William J. McClain be declared by your honors to be a valid and subsisting lien on the premises of the said defendant, The Great Southern Fire Proof Hotel Company, by virtue of said proceedings; that all of the liens on said property be marshaled and that said premises be sold, and that your said orators' claim be satisfied from the proceeds of said sale, and that your orators may have such other and further relief as the nature of the case may require and to your honors seem meet.

May it please your honors to grant your orators a writ of subpœna, directed to the said defendants, commanding each of them at a certain time and under a certain penalty therein to be named, to be and appear before your honors in this honorable court, and then and there to answer all and singular the matters aforesaid, but not under oath, their answer under oath being waived, and to stand, abide by and perform all such other and further orders and decrees herein as to your honors shall seem meet, and your orators will ever pray, etc.

JONES & LAUGHLINS, LIMITED.
OUTHWAITHE & LINN, *Its Solicitors.*

10 EXHIBIT "A."

"COLUMBUS, O., *Dec.* 13, 1894.

W. J. McClain, Columbus, Ohio.

DEAR SIR: We agree to furnish you with nine hundred (900) tons structural steel for the Great Southern hotel, Columbus, Ohio, fitted ready for erection, in accordance with the revised plans and specifications, for the sum of thirty-two thousand five hundred and eighty ($32,580.00) dollars, delivered f. o. b. cars, Columbus.

We also further agree that if an additional quantity of steel is required more than the 900 tons above specified, that we will furnish the same at the rate of $1.81 per hundred pounds, delivered at Columbus, or, if a less amount is required than the 900 tons, then we will allow a reduction from the contract price at the rate of $1.81 per hundred pounds for the difference between the amount shipped and the 900 tons above specified.

It is understood that we can commence shipment at once, and that all the order will be completed before August 1st, 1895.

Terms of payment are cash to be paid on the fifth of month following shipment.

Yours truly,

(Signed) JONES & LAUGHLINS, LIMITED.
R. GERRY.

The above proposition is this day accepted.

(Signed) W. F. McCLAIN."

EXHIBIT "B."

PITTSBURGH, PA., *March* 21, 1896.

Mr. W. J. McClain, Columbus, Ohio, bought of Jones & Laughlins, Limited.

1895.	
April 17th, mdse	$545 10
April 22nd, mdse	501 21
May 1st, mdse	882 55
May 4th, mdse	432 12
May 11th, mdse	606 30
May 20th, mdse	737 82
May 25th, mdse	670 46
11 May 29th, mdse	546 71
June 1st, mdse	621 00
June 5th, mdse	418 98
June 11th, mdse	491 91
June 17th, mdse	629 61
June 18th, mdse	681 66
June 20th, mdse	11 37
June 21st, mdse	496 49
July 3rd, mdse	766 83
July 13th, mdse	513 25
July 17th, mdse	618 24
July 20th, mdse	632 12
July 29th, mdse	520 56
August 2nd, mdse	664 85
August 5th, mdse	719 60
August 8th, mdse	566 58
August 12th, mdse	453 04
August 16th, mdse	507 19
August 20th, mdse	830 85
August 26th, mdse	823 71
August 28th, mdse	1,270 48
August 31st, mdse	581 92
September 9th, mdse	2,368 40
September 10th, mdse	681 08
September 14th, mdse	934 66
September 20th, mdse	461 75
September 26th, mdse	606 56
September 28th, mdse	636 72

October 1st, mdse	$15 42	
October 3rd, mdse	892 14	
October 7th, mdse	1,616 69	
October 9th, mdse	1,142 99	
October 12th, mdse	932 39	
October 15th, mdse	1,126 28	
October 16th, mdse	489 14	
October 17th, mdse	694 92	
October 19th, mdse	922 39	
October 23rd, mdse	753 21	
October 23rd, mdse	1,060 18	
October 24th, mdse	698 12	
October 24th, mdse	1 60	
October 25th, mdse	701 66	
October 28th, mdse	892 92	
October 29th, mdse	612 70	
October 31st, mdse	759 76	
November 4th, mdse	650 05	
November 6th, mdse	847 17	
November 7th, mdse	584 07	
12 November 11th, mdse	519 72	
November 21st, mdse	668 81	
November 25th, mdse	790 36	
November 26th, mdse	495 29	
December 3rd, mdse	575 72	
December 11th, mdse	16 56	
December 31st, mdse	1,054 31	
1896.		
January 10th, mdse	350 07	
January 28th, mdse	42	
		$43,296 74

1895. CREDIT.		
May 9th, by cash	$1,046 31	
June 10th, by cash	3,875 96	
July 26th, by cash	3,351 02	
August 29th, by cash	3,051 00	
October 5th, by cash	10,000 00	
October 31st, by mdse	24 50	
November 21st, by mdse	84	
November 27th, by mdse	1 17	
November 27th, by mdse	8 76	
December 23rd, by cash	10,000 00	
1896.		
March 20th, by mdse. allowance	527 16	
		31,866 72
Balance		$11,410 02

And afterwards, to wit, on the 9th day of January, A. D. 1897, there was issued out of the clerk's office of the court aforesaid our certain subpœna, directed to the marshal of the district and against

the defendants herein; said subpœna is clothed in the words and figures following, to wit:

Subpœna in Chancery.

THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

13 You are hereby commanded to summon the Great Southern Fire Proof Hotel Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio (impleaded with others), citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the eastern division of the southern district of Ohio, aforesaid, at Columbus, on the first Monday in March next, to answer a certain bill in chancery, filed and exhibited in said court, against it by Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, and having their office and principal place of business in the city of Pittsburgh, Pa., citizen of and resident in the State of Pennsylvania.

Hereof you are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of January, A. D. 1897, and in the 121st year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk*,
By C. P. WHITE, *Deputy*.

Memorandum.

The said defendant is required to enter its appearance in this suit, in the clerk's office of said court, on or before the first Monday of February, 1897, otherwise the said bill may be taken *pro confesso*.

B. R. COWEN, *Clerk*.
C. P. WHITE, *Deputy*.

Endorsed on back: Fifty dollars deposited security for costs for which the plaintiff may be liable in this suit.

And afterwards, to wit, on the 9th day of January, A. D. 1897, there was issued out of the clerk's office of the court aforesaid our certain subpœna, directed to the marshal of the district and against the defendants herein; said subpœna is clothed in the words and figures following, to wit:

14 *Subpœna in Chancery.*

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* } *ss:*

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon William J. McClain (impleaded with others), citizen of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the eastern division of the southern district of Ohio, aforesaid, at Columbus, on the first Monday in March next, to answer a certain bill in chancery, filed and exhibited in said court, against him by Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, and having their office and principal place of business in the city of Pittsburgh, Pa., citizen of and resident in the State of Pennsylvania.

Hereof you are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of January, A. D. 1897, and in the 121st year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk*,
By C. P. WHITE, *Deputy*.

Memorandum.

The said defendant is required to enter his appearance in this suit, in the clerk's office of said court, on or before the first Monday of February, 1897, otherwise the said bill may be taken *pro confesso*.

B. R. COWEN, *Clerk*.
C. P. WHITE, *Deputy*.

Endorsed on back: Fifty dollars deposited security for costs for which the plaintiff may be liable in this suit.

And afterwards, to wit, on the 9th day of January, A. D. 1897, the following appearance was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

15 *Appearance of Defendants.*

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JONES & LAUGHLINS, LIMITED, Plaintiffs,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY ET AL., Defendants.

To the honorable judges of the circuit court of the United States for the southern district of Ohio, eastern division, sitting in equity:

We, the undersigned, defendants in the above-entitled action, hereby waive the issuing and service of process, and do voluntarily enter our appearance in said action.

AKRON HYDRAULIC PRESS BRICK CO.,
By RICKETTS, BLACK & STOUFFER, *Its Attorneys.*
SOSMAN & LANDIS,
By NASH & LENTZ, *Their Attorneys.*
THE DECORATIVE ART COMPANY,
By NASH & LENTZ, *Its Attorneys.*
DANIEL W. McGRATH AND
TAYLOR, BEALL & COMPANY,
By BOOTH, KEATING & PETERS, *Their Attorneys.*
F. B. MILLIGAN, *Assignee of Wm. J. McClain.*

And afterwards, to wit, on the 18th day of January, A. D. 1896, came the marshal of the district, to whom the above subpœna was in form directed, and returned the same into the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Marshal's Return.

Received this writ on the 13th day of January, A. D. 1897, and on the 13th day of January, A. D. 1897, I served the same by handing a true copy thereof with all the endorsements thereon to said Nicholas Schlee, president, Jerry P. Bliss, sec'y, each personally.

16 And on the 14th day of January, A. D. 1897, I left a like copy thereof with all the endorsements thereon at the usual place of residence of said Allen W. Thurman, vice-president.

MICHAEL DEVANNEY,
U. S. M., S. D. O.,
By JAMES FARLEY, *Deputy.*

Fees.

3 copies	1 50
Actual expense	20
3 service	6 00
1 return	30
Total	8 00

And afterwards, to wit, on the 18th day of January, A. D. 1896, came the marshal of the district, to whom the above subpœna was in form directed, and returned the same into the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Marshal's Return.

Received this writ on the 13th day of January, A. D. 1897, and on the 14th day of January, A. D. 1897, I served the same by leaving a copy thereof with all the endorsements thereon at the usual place of residence of William J. McClain.

MICHAEL DEVANNEY,
U. S. M., S. D. O.,
By JAMES FARLEY, *Deputy.*

Fees.

1 copy	50
Actual expense	20
1 service	2 00
1 return	30
	3 10

And afterwards, to wit, on the 1st day of February, A. D. 1897, the following appearance was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

17 *Appearance of Great Southern Fire P. Hotel Co.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES, GEORGE M. LAUGHLIN, HENRY A. Laughlin, Jr., Benjamin F. Jones, Jr., Doing Business under Firm Name and Style of Jones & Laughlin, Limited,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation, and William J. McClain *et al.* } No. 796.

To the clerk of said court:

Please enter our appearance as solicitor- and of counsel on behalf of the Great Southern Fire Proof Hotel Company.

J. J. STODDARD,
J. E. SATER,
G. J. MARRIOTT,
Solicitors for Defendant.

And afterwards, to wit, on the 24th day of February, A. D. 1897, the following demurrer was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation, *et al.*, Defendants. } No. 796.

The demurrer of The Great Southern Fire Proof Hotel Company, defendant, to the bill of complaint of the plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's
18 bill to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said plaintiff has not, in and by said bill, made or stated such a cause as doth or ought to entitle *them* to any such discovery or relief as therein sought and prayed for from or against this defendant.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant demurs thereto, and it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN J. STODDART,
J. E. SATER,
G. J. MARRIOTT,
Solicitors for Defendant Hotel Co.

STATE OF OHIO, } *ss:*
Franklin County, }

Nicholas Schlee makes solemn oath and says, that he is the president of the above-named corporation, The Great Southern Fire Proof Hotel Company, and that the foregoing demurrer is not interposed for delay.

N. SCHLEE, *Pr.*

Sworn to before me and subscribed in my presence, this 23rd day of February, 1897.

[SEAL.]

P. J. MAGLEY,
Notary Public in and for Franklin County, Ohio.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOHN J. STODDARD,
Of Counsel for Defendant.

And afterwards, to wit, on the 6th day of March, A. D. 1897, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal C, page 204.

Leave to File Answer.

This day came Sosman & Landis, defendants herein, by their attorneys, Nash & Lentz, and leave of court first being obtained, filed their answer and cross-bill herein.

19 And afterwards, to wit, on the 6th day of March, A. D. 1897, the following answer and cross-bill was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Answer and Cross-bill.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES, GEORGE M. LAUGHLINS, HENRY A. Laughlins, Jr., Benjamin F. Jones, Jr., Doing Business under the Firm Name and Style of Jones & Laughlin, Limited, Having Their Principal Office and Place of Transacting Business in the City of Pittsburgh and State of Pennsylvania, Bring This Their Bill of Complaint

against

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation; William J. McClain, The Grand Rapids School Furniture Company, a Corporation; Daniel W. McGrath, Taylor, Beall & Company, a Partnership; The Akron Hydraulic Press Brick Company, a Corporation; The Fish Stone Company, a Corporation; The Fish Press Brick Company, a Corporation; Sturgeon, Ford & Company, a Partnership; The Decorative Art Company, a Corporation; Meacham & Wright, a Partnership; Sosman & Landis, a Partnership; Dundon & Bergin, a Partnership; The N. S. Tyler Wire Makers' Company, a Corporation; James L. Clarke; The McHose & Lyon Company, a Corporation; William Caldwell, Charles A. Klie; The American Blower Company, a Corporation; Russell & Company, a Corporation; H. C. Johnson & Company, a Partnership; F. O. Schoedinger, Schoedinger, Fearn & Company, a Partnership; Thomas Paige, William White, L. Hilgartner & Sons, a Partnership; F. Bert Milligan, Assignee of William J. McClain; Henry Caren, Receiver of the Firm of Dundon & Bergin; B. L. Chase, The United States Mortgage & Trust Company, a Corporation; E. E. Shaffer, Doing Business under the Name and Style of Shaffer Roofing Company. } No. 796.

Answer of defendants, Joseph S. Sosman and Perry Landis, partners, doing business as Sosman & Landis.

20 Joseph S. Sosman and Perry Landis, partners, doing business under the firm name and style of Sosman & Landis,

having their principal office and place of transacting business in the city of Chicago, and State of Illinois, and defendants in the above-entitled suit, for answer to the bill of complaint therein, or so much thereof as they are advised is material and necessary for them to make answer to, answering, say:

First. We have been informed and believe, and we have no reason to doubt, that the statements in paragraph numbered first in plaintiff's bill of complaint are true.

Second. We believe and admit that the allegations in the second paragraph of said bill of complaint, that said defendant Wm. J. McClain, for some time prior to the 13th December, 1894, and at said date, was engaged as principal contractor for the defendant, The Great Southern Fire Proof Hotel Company, in erecting and constructing for the said The Great Southern Fire Proof Hotel Company, a six-story fireproof hotel and opera-house, or theater, on the premises described in said bill of complaint, under and by virtue of a certain written contract with said Great Southern Fire Proof Hotel Company, in which said contract the said McClain agreed and contracted, as principal contractor, to construct and complete said fireproof hotel and opera-house for said company for the sum of three hundred and forty-five thousand dollars ($345,000), is true. We do not know, and are unable, as to our belief or otherwise, to set forth whether or not the other statements, or any one of the other statements contained in the paragraphs numbered second to fourth, both inclusive, of the plaintiffs' bill of complaint, are or is, true, or which of them are or is true, or in what respect is untrue or otherwise, and we therefore leave the plaintiffs to make such proof thereof as they shall be able to produce.

Third. We admit the allegations contained in the fifth paragraph of the bill of complaint in respect to the assignment and the insolvency of William J. McClain, and his inability to pay the claims of his said creditors, including our claim.

Fourth. We do not know and cannot set forth, as to our belief, or otherwise, whether or not the statements, or any one of them, contained in paragraphs numbered sixth and seventh, both inclusive, of plaintiffs' bill of complaint are or is true or which of them are or is true or untrue.

Fifth. We admit the statements and allegations contained
21 in paragraph numbered eighth of said bill of complaint, in respect to the description of the premises upon which said fireproof hotel and opera-house building is located.

Sixth. We do not know and cannot set forth, as to our belief, or otherwise, whether or not the statements and allegations, or any of them, contained in paragraphs numbered ninth and tenth, both inclusive, of said bill of complaint, are or is true, or which of them, or whether any of them is untrue.

Seventh. We believe and admit that the statements and allegations contained in the paragraphs numbered respectively eleventh and twelfth, both inclusive, of the said bill of complaint, are true, and we particularly admit and aver that the Great Southern Fire Proof Hotel Company has been and is now receiving an annual

rental for the opera-house and theater in said building in the sum of six thousand five hundred dollars ($6,500) in monthly installments of five hundred and forty-one sixty-six and two-thirds hundredths dollars ($541.66⅔) each, and that all the store-rooms in said building are now completed, and have been leased to various parties, and are now occupied by the said parties, at an annual rental, the amount of which is unknown to these defendants, and we especially admit and aver that the property described in said bill of complaint is probably insufficient to pay the incumbrances thereon, and that the appointment of a receiver for the collection of all the said rents therefrom is necessary for the protection and preservation of the rights of these defendants, and all other lienholders thereon.

Eighth. We admit that we claim a lien on the property of the defendant, The Great Southern Fire Proof Hotel Company, as set forth in paragraph thirteenth of the bill of complaint, and we believe that the other persons, companies and corporations set forth in said paragraph thirteenth of the bill of complaint also claim a lien upon the property of the defendant, The Great Southern Fire Proof Hotel Company, as set forth in paragraph thirteenth of said bill of complaint.

Ninth. These defendants further say that on the 28th day of February, 1895, they made and entered into a certain written contract with the defendant, William J. McClain, a copy of which contract is hereto attached and marked "Exhibit A;" that said defendant, William J. McClain, for some time prior to and at the time said contract was entered into, was engaged as principal contractor for the defendant, The Great Southern Fire Proof Hotel Com-
22 pany, in erecting and constructing for the said The Great Southern Fire Proof Hotel Company, a six-story fireproof hotel and opera-house or theater, on the premises hereinafter described, under and by virtue of a certain written contract, made between the said defendant, William J. McClain, and The Great Southern Fire Proof Hotel Company, on or about the 10th day of October, 1894, a copy of which contract is now in the possession of said The Great Southern Fire Proof Hotel Company, to which reference is here made, in which said contract the said McClain agreed and contracted as such principal contractor, to construct and complete said fireproof hotel and opera-house for said company for the sum of three hundred and forty-five thousand dollars ($345,000); that by the terms of said written contract made and entered into between us and the said defendant, William J. McClain, the terms of which contract are herein set forth in "Exhibit A," it was provided that these defendants should furnish and supply to the said defendant William J. McClain, certain described scenery, stage-work, fixtures and properties as set forth in detail in the specifications, which *is* attached and made a part of the contract and marked "Exhibit A." Said scenery, stage-work, fixtures and property were to be supplied and furnished for the sum of seven thousand one hundred dollars ($7,100.00), to be paid as follows: $2,366.66 when the greater part of the scenery named in the specifications was delivered on the stage of said opera-house in Columbus, Ohio;

the further sum of $2,366.66 when all the work named in specifications was well under way toward completion, and the remaining sum of $2,366.68 when the entire contract was completed in accordance with said specifications. It was still further provided by the terms of said contract that the entire work to be performed by these defendants under said contract and all material and supplies should be furnished and ready for use on or before the 1st day of September, 1895, but should there be any delay in the stage being ready for the scenery, by reason of change of plans or unexpected delays, then these defendants were to have a reasonable time after September 1st to complete the same.

Tenth. These defendants further say that in pursuance of the terms and conditions of said written contract, and in strict compliance therewith, they did, between the 28th day of February, 1895, and the 26th day of March, 1896, ship to and furnish the said defendant, William J. McClain, scenery, stage-work, fixtures and properties, as set forth in the itemized statement hereto attached and marked "Exhibit B," which said scenery, stage-work, fix-
23 tures and properties so furnished was all used in and about said opera-house erected by the defendant, said William J. McClain, for the defendant, The Great Southern Fire Proof Hotel Company, in the city of Columbus and State of Ohio; and these defendants say that they have fully kept and performed all the terms and conditions of said written contract on their part to be kept and performed.

Eleventh. These defendants further say that they received from the defendant, William J. McClain, on said written contract, the sum of $2,000, and the defendant, The Great Southern Fire Proof Hotel Co., the sum of $600, leaving a balance still due these defendants from said Wm. J. McClain for said materials furnished to him, and labor performed for him under and according to the terms of said written contract with the full knowledge and consent of the defendants, The Great Southern Fire Proof Hotel Company, of the sum of $4,500, with interest thereon from the 26th day of March, 1896.

Twelfth. That on the 20th day of June, 1896, at 3.55 o'clock p. m., within four months after having furnished said material and having performed said labor, under and according to the terms of said written contract, these defendants duly filed with the recorder of Franklin county, Ohio, an affidavit containing an itemized statement of the amount and value of said materials furnished and labor performed, according to the terms of said written contract between these defendants and the said William J. McClain, with all credits thereon, together with a copy of said written contract with the said William J. McClain, under which said written contract the said material was so furnished and the said labor was so performed, and also a description of the premises upon which the said The Great Southern fireproof hotel and opera-house was situate, which said affidavit was thereafter recorded in Book No. 9, pages 193, 194, 195, 196, and 197, of the records of liens of said Franklin county, Ohio, and upon said 20th day of June, 1896, there was due these defendants upon said account from the said William J. McClain the sum

of $4,500, with interest thereon from the 26th day of March, 1896.

Thirteenth. These defendants further say that the said affidavit was so filed with the said recorder of Franklin county, Ohio, in compliance with the terms and provisions of section 3184, as amended April 13th, 1894, and 3185 of the Revised Statutes of the State of Ohio.

Fourteenth. These defendants further say that the premises
24 upon which said fireproof hotel and opera-house building is located are in the county of Franklin and State of Ohio, and in the city of Columbus, and bounded and described as follows:

"Being in lots Nos. three hundred and fifty-two (352), three hundred and fifty-three (353) and three hundred and fifty-four (354), in the city of Columbus, Ohio, as the same are numbered and delineated on the plat of said city, of record in the recorder's office, Franklin county, Ohio, and located and situated on the southeast corner of Main and High streets of said city."

Fifteenth. These defendants further say that the material so furnished and the labor so performed in accordance with the terms and conditions of said written contract between these defendants and the said William J. McClain, constituted a part of the improvement provided for in the contract between the said William J. McClain, the principal contractor, and the said defendant, The Great Southern Fire Proof Hotel Company, for the erection of said building, and the said — was and is a part of said building.

Sixteenth. These defendants further aver that by reason of the premises their said claim became a valid and subsisting lien on the said The Great Southern fireproof hotel and opera-house building, and the tract of land on which the same is situated, as hereinbefore described, from the date when said labor was first commenced and said material furnished, for the sum of forty-five hundred dollars ($4,500), with interest thereof from the 26th day of March, 1896, the amount now remaining due and upaid upon the claim of these defendants against the defendant, William J. McClain.

Seventeenth. These defendants further say that they are informed and believe that the said opera-house or theater, in said building, was completed on or about the 15th day of September, 1896, since which time the defendant, The Great Southern Fire Proof Hotel Company, has been, and now is, receiving an annual rental therefor in the sum of sixty-five hundred dollars ($6,500.00); that all the store-rooms in said building are now completed, and all have been leased to various parties, and are now occupied by said parties at an annual rental, the amount of which is unknown to these defendants. These defendants are informed and believe that said hotel building is now completed, and that the said defendant, The Great Southern Fire Proof Hotel Company, is negotiating with and about to lease the same to parties, the names of which are unknown to these defendants, at a rental which is unknown to these defendants.

25 Eighteenth. These defendants further say that they are informed and believe that the property heretofore described is insufficient to pay the incumbrances thereon, and the appoint-

ment of a receiver for the collection of all the said rents therefrom is necessary for the protection and preservation of the rights of these defendants, and all other lienholders thereon.

Wherefore, these defendants pray that a receiver may be appointed herein by this honorable court, to collect all said rents from said building so rented as aforesaid, and all rents which may hereafter accrue by reason of any new leases granted by the said hotel company, and that said receiver be ordered to hold said money so collected subject to the order of this court herein; that the said claim of these defendants against the said William J. McClain be declared by your honors to be a valid and subsisting lien on the said premises of the said defendant, The Great Southern Fire Proof Hotel Company, by virtue of said proceedings; that all the liens on said property be marshaled, and that said premises be sold, and that the claim of these defendants be satisfied from the proceeds of said sale, and that these defendants may have such other and further relief as the nature of the case may require, and as to your honors may seem just and equitable.

NASH & LENTZ,
Solicitors for Joseph S. Sosman and Perry Landis.

"EXHIBIT A."

Contract.

Contract for scenery and stage fittings for an opera-house now being erected by the Great Southern Hotel and Opera House Company, situated between Main and High streets, in the city of Columbus, Franklin county, Ohio.

This contract entered into this 28th day of February, A. D. 1895, by and between William J. McClain, of Columbus, Franklin county, Ohio, party of the first part, and Sosman and Landis, of Chicago, Cook county, Illinois, party of the second part, witnesseth:

That the parties of the second part agree to supply to the party of the first part certain described scenery, stage-work, fixtures and properties, as set forth in detail in a certain specification, which is marked Exhibit A, attached to and is hereby made a part of this contract. In consideration of the faithful performance of
26 this contract, according to the specification set forth, the party of the first part agrees to pay the parties of the second part for said work and material supplied the sum of seven thousand one hundred dollars ($7,100.00), to be paid as follows: Two thousand three hundred and sixty-six dollars and sixty-six cents ($2,366.66) when the greater part of the scenery named in the specifications is delivered on the stage of said opera-house in Columbus, Ohio. The further sum of two thousand three hundred and sixty-six dollars and sixty-six cents, when all the work named in specifications is well under way toward completion, and the remaining sum of two thousand three hundred and sixty-six dollars and sixty-eight cents, when the entire contract is completed in accordance with the specifications hereto attached.

The parties of the second part hereby agree that the entire work shall be completed and ready for use on or before the 1st day of September, A. D. 1895, but should there be any delay in the stage being ready for the scenery, by reason of change of plans, unexpected delays, etc., etc., the party of the first part is to give the parties of the second part due notice of the same, to govern them in the shipment of the scenery and stage fittings. The party of the first part agrees to allow the parties of the second part full possession of the stage for a term of at least thirty days before the opening of the theater, as such length of time is an absolute necessity to the parties of the second part in order that they may have sufficient time in which to perform their work of getting in readiness the stage and scenery for the opening date.

Witness our hands and seals this day and date as first above written.

(Signed) W. J. McCLAIN.
(Signed) SOSMAN & LANDIS.

"EXHIBIT B."

CHICAGO, *June* 5, 1896.

W. J. McClain, general contractor, Columbus, Ohio, bought of Sosman & Landis.

Feb.	2, 1896.	1 act drop curtain.
	"	1 asbestos fireproof curtain.
	"	1 valance border.
27	"	1 grand drapery border.
	"	1 trip drapery border.
Jan.	27, 1896.	2 tormentor wings.
	"	1 light fancy chamber set, consisting of:
	"	1 center door piece.
	"	2 set doors.
	"	2 jog pieces.
	"	6 wings.
	"	1 center arch.
	"	2 side arches.
	"	3 borders.
	"	All framed.
	"	1 dark fancy chamber set, consisting of:
	"	1 center door piece.
	"	2 set doors.
	"	2 jog pieces.
	"	6 wings.
	"	1 center arch.
	"	2 side arches.
	"	3 borders.
	"	All framed.
	"	1 Gothic chamber set, consisting of:
	"	1 center door piece.
	"	2 set doors.

Jan. 27, 1896. 2 jog pieces.
" 6 wings.
" 2 arches.
" All framed.
" 1 oak chamber set, consisting of:
" 1 center door piece.
" 2 set doors.
" 2 jog pieces.
" 6 wings.
" 2 arches.
" All framed.
" 1 plain chamber set, consisting of:
" 1 center door piece.
" 2 set doors.
" 2 jog pieces.
" 6 wings.
" All framed.
" 1 kitchen set, consisting of:
" 1 center door piece.
" 2 set doors.
" 6 wings.
" 1 hooded fireplace.
" 3 kitchen borders.
" All framed.
28 " 1 prison set, consisting of:
" 1 center door piece.
" 2 set doors.
" 6 wings.
" 2 jog pieces or columns.
" All framed.
" 1 attic set in back of prison, consisting of:
" 1 center door piece.
" 2 set doors.
" 6 wings.
" All framed.
" 1 palace backing drop 26 x 42 ft.
" 3 palace leg drops 26 x 42 ft.
" All battened.
" 1 dark wood drop 26 x 42 ft.
" 1 light wood drop 26 x 42 ft.
" 1 garden drop 26 x 42 ft.
" 1 cut wood drop 26 x 42 ft.
" 1 conservatory drop 26 x 42 ft.

W. H. McClain, general contractor, Dr. to Sosman & Landis—Continued.

About Jan. 27th, '96. 1 garden drop 26 x 42 ft.
" 1 ancient street drop 26 x 42 ft.
" 1 modern street drop 26 x 42 ft.
" 1 rocky pass drop 26 x 42 ft.

About Jan.	27th, '96.	10 wood wings profiled 7 x 20 ft.
	"	10 wood wings flippers 3 x 20 ft.
	"	6 street wings profiled 7 x 20 ft.
	"	6 street wing flippers 3 x 20 ft.
	"	2 rocky pass wings 7 x 20 ft.
	"	2 rocky pass wing flippers 3 x 20 ft.
	"	6 horizon wings 6 x 20 feet.
	"	All framed.
	"	5 foliage borders 12–15–15 x 45 ft.
	"	All battened.
	"	3 arched sky borders 12 x 42 ft.
	"	All battened.
	"	5 straight sky borders 7–6 x 42 ft.
	"	All battened.
	"	1 conservatory backing.
	"	2 fancy interior backings.
	"	1 plain interior backing.
	"	1 ceiling piece.
	"	All framed.
29	"	1 set house framed.
	"	1 balcony framed.
	"	1 return framed.
	"	1 cottage with return and porch framed.
	"	1 log cabin framed.
	"	1 hedge row three pieces framed.
	"	1 picket fence.
	"	1 large boat.
	"	1 small boat.
	"	2 trees framed and profiled.
	"	1 bridge framed and profiled.
	"	2 bridge rocks framed and profiled.
	"	4 tail rocks framed and profiled.
	"	1 center rock, framed and profiled.
	"	2 water rows framed.
	"	1 ground row framed.
	"	1 bar backing framed.
	"	1 bar counter framed.
	"	1 garden wall.
	"	1 gate framed.
	"	1 garden balustrade in four pieces, framed
	"	1 return framed.
	"	1 fancy mantel.
	"	1 plain mantel.
	"	1 well curb and hood, framed.
	"	1 house balcony and return framed.
	"	1 bay window framed.
	"	2 flower vases framed.
	"	4 dozen grass mats.
	"	2 set banks.
March	15th, '96.	6 Roman stools.
	"	2 throne chairs.

March 15th, '96.	2 throne steps.	
"	1 fire-log and fender.	
"	4 garden chairs.	
"	2 garden settees.	
"	2 garden tables.	
"	2 garden stumps.	
"	1 fancy medallion carpet.	
"	1 green baize carpet.	
"	6 carpet rugs.	
"	4 fur rugs.	
30 "	3 pairs tapestry curtains and poles.	
"	4 table covers.	
"	4 pedestals.	
"	4 pieces papier-mache statuary.	
"	12 music stands.	
Dec. 20th, '95.	4 dozen extension stage braces.	
"	4,800 ft. border battens attached.	
"	1,200 ft. cable wire.	
"	33,000 ft. ½-in. Manilla rope.	
"	400 ft. ¾-in. Manilla rope.	
"	130 ft. ⅜-in. cable wire.	
"	32 patent clips.	
"	380 6-in. loft pulleys and pins.	
"	190 wooden pulley blocks.	
"	96 wooden lead blocks.	
"	29 12-in. pulleys and pins.	
"	29 pulley blocks for same.	
"	24 8-in. pulleys.	
"	24 blocks for same.	
"	8 pairs 12-in. strap hinges.	
"	1 working paint frame with all attachments.	
Jan. 1st, 1896.	Stage machinists' work and putting in traps, grooves.	
March 21st, 1896.	Paint frame, adjusting and putting in place all of the above-described scenery and materials, labor bills, freight, fares, etc., connected therewith..	$6,500 00
Oct. 17th, '95.	Credit by cash on account of note..	2,000 00
	Balance..	$4,500 00

I hereby certify that the above bill is correct, to the best of my knowledge and belief.

PERRY LANDIS.

Subscribed and sworn to before me, this 5th day of June, 1896.

W. F. DUNHAM,
Notary Public.

31 And afterwards, to wit, on the 6th day of April, A. D. 1897, the following opinion was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Opinion of Judge George R. Sage, District Judge, Southern Dist. of Ohio.

United States Circuit Court, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, *et al.*, Respondents. } No. 796.

On demurrer.

The complainants sue to foreclose a mechanics' lien asserted by them as subcontractors upon the hotel building of the respondent, The Great Southern Fire Proof Hotel Company, for certain materials furnished towards the erection of said building between the 16th of April, 1895, and the 29th of January, 1896, under and by virtue of a written contract by and between them and William J. McClain, principal contractor for said company, in the erection of its building. The lien is asserted under and by virtue of section 3184 Ohio Statutes, as amended, and section 3185 of the Rev. Stats., as supplemented April 13, 1894. 91 O. L., 135, section 3184, provides that "a person who performs labor, or furnishes machinery or material for constructing, altering or repairing" any structure mentioned in the section, including a house, mill, manufactory or other building "by virtue of a contract with or at the instance of the owner thereof, or his agent, trustee, contractor or subcontractor," shall have a lien to secure the payment of the same upon such "house, mill, manufactory or other building, and upon the interest, leasehold or otherwise, of the owner in the lot or land, on which the same may stand, or to which it may be removed."

The supplement to section 3185, designated as 3185*a*, provides that "in all cases where the labor, material or machinery referred to in sections 3184 and 3185 shall be furnished by any person other than the original contractor with such owner, or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens, for which the property may be held, shall not, in the absence of
32 fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, materialmen, or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section 3184, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such subcontractors and materialmen and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

Section 3185 provides that "such person, in order to obtain such lien, shall, within four months from the time of performing such labor or furnishing such machinery or material, file with the recorder of the county where the labor was performed or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery or material," and other items and particulars not necessary to be here quoted, "and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or towards the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter."

The respondents demur to the bill *of* insufficiency. The demurrer was argued solely upon the question of the constitutionality of the act of April 13, 1894, there being no objection to the bill on other grounds. The supreme court of Ohio, in Young *v.* The Lion Hardware Company, 32 Weekly Law Bulletin, 315, held that the act of April 13, 1894, "in so far as it gives a lien on the property of the owner to subcontractors, laborers and those who furnish machinery, material or title to the contractor is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract are bound by the terms of the contract between him and the owner." Much time in the argument was given to the dis-

33 cussion of the proposition that this court should follow that decision without examining into the merits of the question, and that proposition is elaborately presented in the brief for the respondents. The material was furnished and delivered by complainants and used in the construction of the hotel of respondents before the decision of Young *vs.* The Lion Hardware Company was announced. In Burgess *v.* Seligman, 107 U. S., 32, the Supreme Court of the United States said: "When contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation — may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Action on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseeming conflict with well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies

between citizens of different States, was to constitute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." In Carroll County *v.* Smith, 111 U. S., 556, the Supreme Court said "that the decision of the highest court of a State, construing the constitution of the State, is not binding upon this court as affecting the rights of citizens of other States in litigation here, when it is in conflict with previous decisions of this court, and when the rights which it affects here were acquired before it was made." To the same effect is Anderson *v.* Santa Anna, 116 U. S., 356. In Louisville Trust Company *v.* The City of Cincinnati, 76 Federal Rep., 296, the circuit court of appeals of this circuit held that "where a contract or obligation has been entered upon before there has been any judicial construction of the State statute upon which the contract or obligation depends, by the highest court of the State, a Federal court, obtaining jurisdiction of the question touching the validity, effect or obligation of such a contract will, while leaning to an agreement with the State court, exercise
34 an independent judgment as to the validity and meaning of such contracts, and will not necessarily follow opinions of the State court construing such statute, if such decisions be rendered after the rights involved in the controversy originated."

Counsel for respondents attempt to distinguish these cases, and especially The Louisville Trust Company *vs.* The City of Cincinnati, from the case now under consideration, but I am not able to see that there is any material difference. It is true that in Louisville Trust Company *vs.* The City of Cincinnati the question was whether the statute was applicable, and not whether it was valid. The gist of the Federal cases cited is that under the circumstances stated, the Federal courts will not apply the original rule that the decision of the highest court of a State, construing or passing upon the validity of a State statute, is binding. It will be necessary, therefore, to look into the question of the constitutionality of the statutory provisions involved, independently of the decisions made by the supreme court of Ohio.

Section 3184, as amended, purports to give to a subcontractor a lien on the house, mill, manufactory or building to secure the payment of his claim for labor, machinery or material. By section 3185*a*, this lien is not to exceed the actual value of such labor machinery or material, and the aggregate amount of liens is not, in the absence of fraud or collusion between the owner and original contractor, to exceed the amount of the price agreed upon between them for the performing of such labor and the furnishing of such material or machinery. These provisions are made irrespective of the state of the account between the owner of the building and the principal contractor. The owner may have paid in advance, according to the terms of his contract, and, if so, he must, according to the statute, pay in addition the amount of the subcontractor's lien. If his contract with the principal contractor provide for payment, not in money, but by the transfer of property, as land, he must, never-

theless, pay in money to the subcontractor, in order to discharge his lien, the full amount thereof. It is my opinion that the supreme court of Ohio rightly held that this provision is an interference with the vested right of the owner to contract for his building upon the best terms possible, and that "if he can, by making a contract to pay in advance, or by exchange of securities or other property, acquire his building cheaper than by contracting to pay after four months from its completion, he has the inalienable right to so acquire it, and to be protected in
35 its enjoyment; and it is not within the power of the General Assembly to compel him to pay a higher price for his building, for the protection of laborers and furnishers with whom he has no contractual relation." This view is supported by the statement of the law in Overton on Liens, section 553, and by the following authorities: The supreme court of Pennsylvania in Waters *v.* Wolf, 162 Pa. St., 153, held that a statutory provision which made the written consent of the subcontractor necessary in order to bind him by a stipulation in the contract between the original contractor and the owner that no mechanics' liens should be filed, was unconstitutional in that it attempted to create a debt and give a lien therefor against the express covenant in the contract; also that a provision that the contractor should be the agent of the owner in ordering work or materials, and that any subcontractor doing work or furnishing materials should be entitled to a lien, notwithstanding any stipulations to the contrary in the contract between the owner and the contractor, unless such stipulation should be consented to by the subcontractor, was unconstitutional because it attempted to frame a new contract and substitute it for the one made by the parties. The court said that the indefeasible right to acquire and possess property and the right of freedom of contract in the acquisition and protection of property necessarily included the right to make reasonable contracts for the improvement of property; and that a contract that no mechanics' lien should be filed was not unreasonable as to either contractor or subcontractor. In Stewart *v.* Wright, 52 Iowa, 335, the court said: "If one should contract with a builder to erect a house and agree to pay him in advance and comply with his contract by making the payments, we very much question whether it is within the power of the legislature to require that he shall be liable to pay for his building twice by paying off claims of subcontractors who may assert liens after the payments have been made." To the same effect, see Lumber Co. *vs.* Sault Savings Bank, 77 Mich., 199, where the court said: "That a mechanics' lien law enacted for the sole purpose of enabling strangers to the title to land to subject it to sale for obligations to which the owner never became bound, and in which he has no part whatever, is unconstitutional, leaves the law as it was before its passage." That decision was quoted and followed in Mellis *v.* Race, 78 Mich., 80; Snell *v.* Race, 78 Mich., 334. The supreme court of Minnesota, in Meyer *v.* Burlandi, 37 Minn., 438, declared that as liens
36 are incumbrances upon the owner's property "it is fundamental that they can only be created by his consent or

authority. No man can be deprived of his property without his consent, except by due process of law. The basis of the right to enforce a claim as a lien against property, is the consent of the owner, and it is upon this principle alone that laws giving liens to subcontractors are sustained." It is true that in Mallory *v.* Le Crosse Abattoir Co., 18 Wis., 182, a statute similar to the Ohio statute, under consideration, was, by a divided court, held constitutional, but I am forced to the conclusion that the dissenting opinion in that case is the better statement of the law. See also Henry *v.* Rice, 18 Mo. App., 512; Renton *v.* Conley, 49 Cal., 187, where it was held that a statute similar to the Ohio statute was invalid because it sought to hold the property for more than the contract price. There are decisions to the contrary, as cited in brief for complainants, but they only serve to emphasize the statement of the court in Burgess *v.* Seligman; Anderson *v.* Santa Anna, and Louisville Trust Company *v.* The City of Cincinnati, *supra*, that it is the duty of the Federal court to lean to an agreement with the State court, especially in cases of doubt. The reasoning of the cases which declare statutes of the same character as the Ohio statutes invalid is, in my judgment, to be preferred to that of the courts which uphold such laws.

Counsel for the complainants cite Winder *v.* Caldwell, 14 How., 434, and Purinton *v.* The Hull of a New Ship, 2 Curtis, 416, as Federal decisions where a statute similar to the one complained of in this case was enforced. These cases were decided on other points. In neither of them was the constitutionality of the act questioned by counsel or considered by the court. Cases are also cited for complainants which sustain the proposition that statutory liens may be created in favor of the contractors. This proposition generally stated is undeniable. So long as such a statute does not interfere with the right of the owner to make contracts, there can be no question as to its validity. A lien law which only provides a statutory subrogation and protects the same by a lien, only enacts and secures an equity, and to such an enactment the owner of the property covered by the lien can make no valid objection. But, in the case now under consideration, the objection is, that the owner's right to make his own contracts is interfered with, and the objection is well taken.

Reference is made by counsel for complainants to decisions by the supreme court of Ohio prior to that announced in Young *v.*
37 The Lion Hardware Company, in cases which they claim involved the same principle of constitutional construction, and which are in conflict with that opinion. They urge that under those decisions and under the law as understood and adjudicated then and until the complainants' material herein were furnished, the act complained of must necessarily have been held constitutional. Their proposition is, that under such circumstances the rule is clear, not only that the United States court, in a case within its jurisdiction, will act independently, but that if it finds that decisions do so conflict, it will follow the early decisions as to all rights accruing under them before the last decision. In support of this proposition

they cite Douglass *v.* Pike County, 101 U. S., 677. But in that case the prior decisions were made under the same act. Here the decision in Young *v.* The Lion Hardware Company is the first and only decision by the supreme court under the act. In Douglass *v.* Pike County, the supreme court said: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

But here, the case arises under an amendment of the law, and not under a change of decision. Moreover, the amendment is a departure from all previous legislation by the State of Ohio upon the subject. Counsel admit that there was no adjudication in Ohio of the exact point decided in Young *v.* The Lion Hardware Co. prior to that case, but they insist that the principles involved had been settled in many cases, which were in effect, if not in words, overruled by that decision. Without stopping to cite and comment upon the cases referred to in support of this contention, it is sufficient to say that their view, if adopted, would extend the rule laid down in Douglass *v.* Pike County, beyond all precedent. The demurrer will be sustained, and the bill and the cross-bill of the respondents, Sosman and Landis, to which also a demurrer for insufficiency was filed, upon the same ground as those urged in support of the demurrer to the bill, will be dismissed.

GEO. R. SAGE,
U. S. District Judge, S. D. O.

April 5, 1897.

And afterwards, to wit, on the 12th day of April, A. D. 1897,
38 the following demurrer was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Demurrer to Answer of Sosman & Landis.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, a Corporation, *et al.*, Defendants. } No. 796.

The demurrer of The Great Southern Fire Proof Hotel Company, defendant, to the cross-bill of complaint of the defendants Sosman & Landis.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said defendants' cross-bill to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said defendant has not in and by said cross-bill

made or stated such a cause as doth or ought to entitle them to any such discovery or relief as therein sought and prayed for, from or against this defendant.

Wherefore, and for divers other good causes of demurrer appearing on the said cross-bill, this defendant demurs thereto, and it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN J. STODDART,
JOHN E. SATER,
G. J. MARRIOTT,
Solicitors for Defendant Hotel Co.

STATE OF OHIO, *Franklin County,* } ss:

Nicholas Schlee makes solemn oath and says that he is the president of the above-named corporation, The Great Southern Fire Proof Hotel Company, and that the foregoing demurrer is not interposed for delay.

N. SCHLEE, *Pr.*

39 Sworn to before me and subscribed in my presence, this 10th day of February, 1897.

P. J. MAGLEY,
[SEAL.] *Notary Public in and for Franklin County, Ohio.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOHN J. MARRIOTT,
Of Counsel for Defendant.

And afterwards, to wit, on the 3rd day of May, A. D. 1897, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal C, page 224.

This day came the parties and thereupon this cause came on to be heard on the demurrer of the defendants, The Great Southern Fire Proof Hotel Company, filed to the bill of complaint, and also upon the demurrer of the said The Great Southern Fire Proof Hotel Company to the cross-bill of complaint of the defendants, Sosman and Landis, and was argued by counsel and submitted to the court.

On consideration whereof, and being fully advised in the premises, the court doth find that said demurrers, and each thereof, are well taken and doth allow and sustain said demurrers and each thereof.

It is therefore ordered and decreed that said demurrers, and each thereof, be, and they hereby are, allowed and sustained.

And thereupon, the said complainant not desiring to amend its said bill of complaint, and the said defendants, Sossman & Landis, not desiring to amend their said cross-bill, it is ordered adjudged and decreed that said bill of complaint and said cross-bill be, and the same are each hereby, dismissed as to the defendant, The Great Southern Fire Proof Hotel Company, with costs to the defendant, The Great Southern Fire Proof Hotel Company, to be taxed.

To all of which rulings, judgments, orders and decrees the said complainants and the said defendants, Sossman and Landis, except and ask that their exceptions in that behalf be noted by the court and hereby, in open court, give notice of and pray an appeal from each and all of said rulings, judgments, orders and decrees.

40 The appeal is granted and the amount of the bond therefor is fixed at $250.00.

And afterwards, to wit, on the 29th day of May, A. D. 1897, the following petition of appeal was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Petition on Appeal of Jones & Laughlins.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants, *vs.* THE GREAT SOUTHERN FIRE PROOF HOTEL Company, Defendant.	In Equity. Petition on Appeal.

Now comes Jones & Laughlins, Limited, complainants herein, and conceiving themselves to be aggrieved by the decree made and entered on or about the 3rd day of May, 1897, in the above-entitled cause, do hereby appeal from said order and decree to the United States circuit court of appeals for the sixth circuit for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made and decree rendered, duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit.

OUTHWAITHE & LINN,
Attorneys for Complainants.

Dated this — day of ——, 1897.

The foregoing claim of appeal is allowed.

And afterwards, to wit, on the 29th day of May, A. D. 1897, the following assignment of errors was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

41 *Assignment of Errors of Jones & Laughlins.*

In the Circuit Court of the United States, Southern District of Ohio Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL CO., Defendants.

Assignment of errors.

And now comes the said complainants in this action and say that the decree in said cause is erroneous and against the just rights of said complainants for the following reasons:

First. The court erred in sustaining the demurrer of the defendant, The Great Southern Fire Proof Hotel Company, to the bill of complaint.

Second. The court erred in rendering judgment in favor of the defendant, The Great Southern Fire Proof Hotel Company, and against these complainants.

Third. Judgment should have been rendered in favor of these complainants and against said defendant.

Fourth. The court erred in holding the sections of the mechanics' lien law of Ohio, under which complainants seek to enforce the lien set out in their bill, to be unconstitutional.

OUTHWAITHE & LINN,
Attorneys for Complainants.

And afterwards, to wit, on the 29th day of May, A. D. 1897, the following petition on appeal was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Petition on Appeal of Sossman & Landis.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants,
vs.
THE GREAT SOUTHERN FIRE PROOF HOTEL Co. *et al.*, Defendants.
In Equity. Petition on Appeal.

42 Now come Sossman and Landis, defendants herein, and conceiving themselves to be aggrieved by the decree made and entered on or about the 3rd day of May, 1897, in the above-entitled cause, do hereby appeal from said order and decree to the United States circuit court of appeals for the sixth circuit, for the reasons specified in the assignment of errors, which is filed herein, and they pray that this appeal may be allowed, and that the transcript of the record, proceedings and papers upon which said order was made and decree rendered, duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit.

NASH & LENTZ,
Attorneys for Sossman & Landis.

And afterwards, to wit, on the 29th day of May, A. D. 1897, the following assignment of errors was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Assignment of Errors of Sossman & Landis.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

BENJAMIN F. JONES ET AL., Complainants, *vs.* THE GREAT SOUTHERN FIRE PROOF HOTEL Co. *et al.*, Defendants.	796. Assignment of Errors.

Now comes Sosman and Landis, defendants in this action, and say that the decree in said cause is erroneous and against the just rights of the said defendants, Sosman and Landis, for the following reasons:

First. The court erred in sustaining the demurrer of the defendant, The Great Southern Fire Proof Hotel Company, to the cross-bill of complaint filed by these defendants, Sosman and Landis.

Second. The court erred in rendering judgment in favor of the defendant, The Great Southern Fire Proof Hotel Company, and against these defendants, Sosman and Landis.

Third. Judgment should have been rendered in favor of these defendants, Sosman and Landis, and against said defendants, The Great Southern Fire Proof Hotel Company.

Fourth. The court erred in holding the sections of the
43 mechanics' lien law of Ohio, under which these defendants sought to enforce the lien set out in their cross-bill to be unconstitutional.

NASH & LENTZ,
For Sosman & Landis.

May 27, 1897.
Dated this 27th day of May, 1897.
The foregoing claim of appeal is allowed.

And afterwards, to wit, on the 5th day of June, A. D. 1897, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal C, page 241.

Appeal Allowed; Bond Fixed.

This day came Sosman & Landis, defendants herein, by their attorneys, Messrs. Nash & Lentz, and presented their petition for allowance of appeal to the United States circuit court of appeals for the sixth circuit, accompanied by an assignment of errors, which said petition, after due consideration by the court, is granted and appeal allowed, and bond fixed at two hundred and fifty dollars.

And afterwards, to wit, on the 10th day of June, A. D. 1897, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal C, page 253.

Appeal Allowed; Bond Fixed.

This — day of ——, 1897, came the complainants, by their attorneys, and filed herein and presented to the court their petition praying for the allowance of an appeal intended to be urged by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States court of appeals for the sixth judicial circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the appeal upon the complainants' giving bond according to law in the sum of two hundred and fifty dollars ($250.00).

44 And afterwards, to wit, on the 10th day of June, A. D. 1897, the following bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, as principal, and The American Bonding and Trust Company of Baltimore, Maryland, as surety, are held and firmly bound unto The Great Southern Fire Proof Hotel Company in full and just sum of two hundred and fifty dollars, to be paid to the said The Great Southern Fire Proof Hotel Company, its certain attorneys, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 8th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately, at the January term, 1897, of the circuit court of the United States, southern district of Ohio, eastern division, the suit pending in said court between Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin J. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, and The Great Southern Fire Proof Hotel Company, *et al.*, defendants, a judgment was rendered against said Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin J. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, and The Great Southern Fire Proof Hotel Company, *et al.*, defendants, a judgment was rendered against said Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin J. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, plain-

tiffs, and the said Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin J. Laughlins, Jr., doing business under the firm name of Jones and Laughlins, Limited, having obtained an appeal and filed a copy thereof in the clerk's office to reverse the judgment in the aforesaid suit, and a citation directed to the said The Great Southern Fire Proof Hotel Company, citing and admonishing it to be and appear at a session of the United States circuit court of appeals for the sixth judicial circuit, to be holden at the city of Cincinnati, in said circuit, on the — day of —— next:

45 Now, the condition of the above obligation is such, that, if the said Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin J. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, complainants, shall prosecute their appeal to effect, and answer all damages and costs, if they fail to make their appeal good, then the above obligation to be void; otherwise to remain in full force and virtue.

BENJAMIN F. JONES,
GEO. H. LAUGHLINS,
HENRY A. LAUGHLINS, JR., AND
BENJAMIN J. JONES, JR.,
Doing Business under the Firm Name of Jones & Laughlins, Limited,
By OUTHWAITHE & LINN, *Attorneys.*
THE AMERICAN BONDING & TRUST CO. OF MARYLAND,
By W. D. TURNER, *Sp'c'l Ag't.*
A. L. THURMAN, *Attorney-in-fact.*

Sealed and delivered in presence of—
E. BRAGUMIER,
SINGLETON P. OUTHWAITHE.

Approved:
GEO. R. SAGE,
U. S. District Judge, S. D. O.

And afterwards, to wit, on the 28th day of June, A. D. 1897, the following bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, Joseph S. Sosman and Perry Landis, partners, doing business as Sosman & Landis, of Chicago, Illinois, as principal, and The American Bonding & Trust Company of Baltimore, Maryland, as surety, are held and firmly bound unto The Great Southern Fire Proof Hotel Company in the full and just sum of two hundred and fifty dollars ($250.00), to be paid to the said The Great Southern Fire Proof Hotel Company, its certain attorneys, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, adminis-

trators, successors and assigns, jointly and severally by these presents.

46 Sealed with our seals and dated this 8th day of June, A. D. 1897.

Whereas, lately, at the January term, 1897, of the circuit court of the United States, southern district of Ohio, eastern division, in the suit pending in said court between Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name of Jones & Laughlins, Limited, plaintiffs, and the Great Southern Fire Proof Hotel Company, *et al.*, defendants, a judgment was rendered against said Sosman & Landis, partners, and said Sosman & Landis having obtained an appeal to the United States circuit court of appeals, and filed a copy thereof in the clerk's office to reverse the judgment in the aforesaid suit, and a citation directed to the said The Great Southern Fire Proof Hotel Company, citing and admonishing it to be and appear at a session of the United States circuit court of appeals for the sixth judicial circuit, to be holden at the city of Cincinnati, in said circuit, on the 5th day of October next:

Now, the condition of the above obligation is such, that, if the said Sosman & Landis, a partnership, shall prosecute their appeal to effect, and answer all damages and costs, if they fail to make their appeal good, then the above obligation to be void; otherwise to remain in full force and virtue.

JOS. S. SOSMAN AND PERRY LANDIS,
Partners, Doing Business as Sosman & Landis,
By NASH & LANDIS, *Their Attorneys.*
THE AMERICAN BONDING & TRUST COMPANY OF MARYLAND,
By W. D. TURNER, *Special Agent.*
A. L. THURMAN, *Attorney-in-fact.*

Sealed and delivered in presence of—
E. BRAGANIER.
Z. P. LINN.

Approved:
GEO. R. SAGE,
U. S. Dist. Judge, S. D. O.

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* } ss:

47 I, Benjamin R. Cowen, clerk of the circuit court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause, and as the same appears of record and on file in the clerk's office of said court.

In witness whereof, I have hereunto set my hand and affixed the

seal of said court, at the city of Columbus, Ohio, this 6th day of July, A. D. 1897.

[SEAL.] B. R. COWEN, *Clerk*,
By JANIE W. F. COWEN, *Dep. Clerk*.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

To the Great Southern Fire Proof Hotel Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the* 27th day of July next, pursuant to a petition for appeal filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, eastern division, wherein Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twenty-eighth day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

GEO. R. SAGE,
Judge of the United States District Court within and for the Southern District of Ohio, Sitting and Holding Circuit Court at the Trial of said Entitled Cause.

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* Not exceeding 30 days from the day of signing.

48 UNITED STATES OF AMERICA, }
Southern District of Ohio. }

Received this writ at Columbus, Ohio, on the 30th day of June, 1897, and on the 2nd day of July, 1897, I served the within-named The Great Southern Fire Proof Hotel Company, a corporation, by handing a true copy hereof, with all the endorsements thereon, personally to Nicholas Schlee, president of said company, and on the 3rd day of July, 1897, I served a true copy hereof, with all the endorsements thereon, by handing the same personally to Frank Rinehardt, treasurer of said company, The Great Southern Fire Proof Hotel Company, a corporation. And on the 3rd day of July I served a true copy hereof, with all the endorsements thereon, on Gerard P. Bliss, secretary of the within-named company, by leaving

the same in the hands of his wife, an adult member of his family, at his usual place of residence in Columbus, Ohio.

MICHAEL DEVANNEY,
U. S. Marshal, S. D. O.,
By JAMES FARLEY, *Deputy.*

6 copies	$1 50
3 services	6 00
6 miles writ	36
	$7 86

No. 796. Marshal's civil docket No. 375. United States circuit court, southern district of Ohio, eastern division. Great Southern Fire Proof Hotel Co. *vs.* Benjamin F. Jones. Citation. Filed July 12, 1897. B. R. Cowen, clerk.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

United States Circuit Court of Appeals for the Sixth Circuit.

To the Great Southern Fire Proof Hotel Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the* seventh day of August next, pursuant to a petition for appeal filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, eastern division, wherein
49 Joseph S. Sosman and Perry Landis, partners, doing business as Sosman & Landis, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-second.

GEO. R. SAGE,
U. S. Dist. Judge, S. D. O.

* Not exceeding 30 days from the day of signing.

UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* } *ss:*

Received this writ at 9 a. m. on the 9th day of July, 1897, at Columbus, Ohio, and at 9 a. m. on the 10th day of July, 1897, I executed the same by handing a true copy thereof, with all the endorsements thereon, to Nicholas Schlee, president; Frank Rhinehardt,

treas., of said within-named company; and on the same day I served Gerard P. Bliss, sec'y, by leaving a copy thereof in the hands of his wife, an adult member of his family, at his usual place of residence.

MICHAEL DEVANNEY,
U. S. M., S. D. O.,
By JAMES FARLEY, *Deputy.*

Fees.

3 copies	$1 50
Mileage	36
3 services	6 00
	$7 86

No. 796. Marshal's civil docket No. 381. United States circuit court, southern district of Ohio, eastern division. Jones & Laughlin, Limited, *vs.* The Great Southern Fire Proof Hotel Company, *et al.* Citation. Filed July 12, 1897. B. R. Cowen, clerk. Nash & Lentz.

50 And afterwards, to wit, on July 23, 1897, an appearance was entered in said court in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit,
October Term, 1896.

JONES & LAUGHLIN
v.
GREAT SOUTHERN FIRE PROOF HOTEL COMPANY. } No. 535.

To the clerk of said court:

Please enter my appearance as counsel for the appellants.

TALFOURD P. LINN.

And afterwards, to wit, on July 26, 1897, an appearance was entered in said court in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit,
October Term, 1896.

No. 535.

To the clerk of said court:

Please enter my appearance as counsel for the appellants.

GEORGE K. NASH.

51 And afterwards, to wit, on October 25, 1897, a stipulation was filed in said court in said cause continuing the cases to the heel of the calendar, which is in the words and figures following:

Form No. 168.

The Western Union Telegraph Company.

Incorporated.

21,000 offices in America. Cable service to all the world.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

This is an unrepeated message, and is delivered by request of the sender under the conditions named above.

THOS. T. ECKERT,
President and General Manager.

Received at N. W. cor. 4th and Vine Sts., Cincinnati, O., standard time.

16 Fa ar 30 paid ex w

Fa Columbus, O., 23.

Frank O. Loveland, clerk United States circuit court of appeals, Cin., O.:

The two Great Southern Fire Proof Hotel cases may be placed at the foot of the calendar.

GEORGE K. NASH,
J. J. STODDART,
T. P. LINN,
J. E. SATER,
Attorneys for Parties in Interest.

4.04 p. m.

And afterwards, to wit, on December 15, 1897, and entry was made upon the journal of said court in said cause, which is in the words and figures as follows:

52 United States Circuit Court of Appeals for the Sixth Circuit.

BENJ. F. JONES ET AL.
v.
GREAT SOUTHERN FIRE PROOF HOTEL COMPANY.

SOSMAN & LANDIS
v.
SAME.

Appeals from the circuit court of the United States for the southern district of Ohio.

Before Judges Taft, Lurton, and Clark.

These causes came on to be heard this day and were argued by Messrs. T. P. Linn and George K. Nash, for the appellants, and Messrs. J. J. Stoddart and Mr. J. E. Sater, for the appellee, and *was* submitted.

And afterwards, on April 5, 1898, a decree was entered in said cause; which decree reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

BENJ. F. JONES ET AL.
v.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY. # 535.

Appeal from the circuit court of the United States for the southern district of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court
53 in this cause be, and the same is hereby, reversed with costs, and the cause is remanded to the court whence it came, with directions to overrule the demurrer and require the defendants to answer.

And afterwards, on the same day, to wit, a decree was entered in said cause; which decree reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

SOSMAN & LANDIS
v.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY. # 536.

Appeal from the circuit court of the United States for the southern district of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs, and the cause is remanded to the court whence it came, with directions to overrule the demurrer and require the defendant to answer.

And afterwards, on the 15th day of April, an opinion was rendered in said causes, which is in the words and figures as follows:

Opinion.

54 United States Circuit Court of Appeals, Sixth Circuit.

BENJAMIN F. JONES ET AL., Appellants,
v.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, Appellee.

SOSMAN & LANDIS, Appellants,
v.
THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, Appellee.

} Nos. 535, 536.

Appeals from the circuit court of the United States for the eastern division of the southern district of Ohio.

Submitted December 15, 1897; decided April 5, 1898.

Before Taft and Lurton, circuit judges, and Clark, district judge.

This is a bill to enforce the statutory lien given to persons who do labor or furnish materials for the construction or repair of any house or other building, by section 3184, Revised Statutes of Ohio, as amended by the act of April 13, 1894. By section 3184 it is provided that "a person who performs labor, or furnishes machinery or material for constructing, altering or repairing" any house or other structure mentioned in the section, "by virtue of a contract with or at the instance of the owner thereof, or his agent, trustee, contractor or subcontractor, shall have a lien to secure the payment of the same," upon the structure, "and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand." Section 3185 provides that the lien shall be claimed and recorded within four months from the time of furnishing such labor or material, and that the lien shall operate from the date of the first item in the account. Section 3185*a* is as follows:

"In all cases where the labor, material or machinery referred to in sections 3184 and 3185 shall be furnished by any person other than the original contractor with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, mate-
55 rial or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original con-

tractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, materialmen or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section thirty-one hundred and eighty-four, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and subcontractors, materialmen and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

The complainants are members of a firm doing business at Pittsburg, Pa., and are each citizens of Pennsylvania. The defendants are, The Great Southern Fire Proof Hotel Company, a corporation of the State of Ohio, against whom the lien is asserted, and William J. McClain, a citizen of Ohio and the contractor to whom materials were sold for use in the hotel building constructed by him at Columbus, Ohio, for the Great Southern Fire Proof Hotel Company. The other defendants are corporations, firms, and individuals, claiming liens of various kinds upon the same property. They are all citizens of States other than Pennsylvania.

The bill in substance avers that the defendant, McClain, entered into a contract with the Great Southern Fire Proof Hotel Company to construct and complete at Columbus, Ohio, a six-story fireproof hotel and opera-house for the sum of $345,000; that complainants contracted on the 13th of December, 1894, to furnish to said McClain, for use in said building, some nine hundred tons of structural steel; that under said agreement, they delivered, between April 16, 1895, and January 24, 1896, such steel to the value of $43,296.74, which steel so furnished was all used in the construction of said house. They further aver that a balance of $11,410.02 is due and unpaid, and that within four months after said steel was delivered they filed and recorded their lien as required by section 3185, Revised Statutes of Ohio. There is no averment that the hotel company is indebted to said McClain, or that it was indebted when the lien was filed. Neither is it averred that said hotel company had any notice of any such contract between complainants and McClain, nor promised to pay for same, nor that any contractual relations whatever existed between it and complainants. The hotel company demurred to the bill for want of equity. This demurrer was sustained and the bill dismissed by Judge Sage, whose opinion is reported in 79 Federal Reporter, 477.

56 LURTON, circuit judge, after making the foregoing statement of facts, delivered the opinion of the court:

The decision must turn here upon the constitutionality of the Ohio statute giving the subcontractors, laborers and materialmen a lien upon the building and property of the owner, for labor or materials furnished at the instance of the principal contractor. So much of the statute as gives a lien to complainants as subcontractors has been declared by the supreme court of Ohio to be null and void, as

in conflict with the Ohio bill of rights, which, among other things, declares that the right of "acquiring, enjoying and possessing property" is inalienable. That decision was made in a suit to which complainants were not parties, and after their rights under the law had accrued and their claim of lien recorded as required by the statute.

Young *v.* Lion Hardware Co., 55 Oh. St., 423.

Does that decision furnish a rule of decision which is obligatory upon courts of the United States? When a citizen of one State enters into a contract with a citizen of another, he acquires the constitutional right to have that contract interpreted and enforced by a court of the United States. That right does not by any means involve the application of a different rule of decision, for the judiciary act requires that the laws of the several States shall be regarded as rules of decision, in trials at common law, where they apply. But even the decision of the highest courts of the State by whose law the rights of the parties are to be ascertained and enforced, does not, under all circumstances, furnish a rule of decision obligatory upon courts of the United States. The question is, when do they apply? In the past this inquiry has involved no little friction between the courts of the Union and those of the States. But the final arbiter of all such constitutional questions is the Supreme Court of the United States. So far as the inquiry is pertinent to the decision which must be here made that court has in an authoritative way decided:

1. That such decisions are not necessarily obligatory upon courts of the United States where they affect contracts which were valid under the constitution and laws of the State as interpreted and enforced by its highest judicial tribunals at the time they were entered upon.

Rowan *v.* Runnels, 5 How., 134.
Ohio Life & Trust Co. *v.* Debolt, 16 How., 432.
Gelpcke *v.* The City of Dubuque, 1 Wall., 175.
Olcott *v.* The Supervisors, 16 Wall., 678.
Taylor *v.* Ypsilanti, 105 U. S., 60.
Douglass *v.* County of Pike, 101 U. S., 677.
Louisville Trust Co. *v.* Cincinnati, 47 U. S. A., 36–46.

In Rowan *v.* Runnels, *supra*, Chief Justice Taney said:

"Undoubtedly this court will always feel itself bound to
57 respect the decisions of the State courts, and from the time they were made regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court, were lawfully made."

In Douglass *v.* County of Pike, cited above, the court, after reviewing the preceding cases, decided by that court, said:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amend-

ment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

2. Neither are such decisions obligatory upon courts of the United States when thereby the validity of contracts between a citizen of the State and a citizen of another State is affected, which were executed before there was any judicial construction of the statute or constitution which seemed to authorize the contract in question.

Burgess *v.* Seligman, 107 U. S., 20–33.
Pleasant Township *v.* Ætna Life Ins. Co., 138 U. S., 67–72.
Louisville Trust Co. *v.* Cincinnati, 47 U. S. A., 36–47.

In Louisville Trust Co. *v.* Cincinnati, *supra*, this court, after stating the general rule to be that a court of the United States would adopt and follow the construction of a State statute announced by the highest court of the State, said:

"A well grounded exception exists where contracts and obligations have been entered upon before there has been any judicial construction of the statutes upon which the contract or obligation depends by the highest court of the State whose statute is involved. In such a case, if a court of the United States obtains jurisdiction of a question touching the validity, effect, or obligation of such a contract, it will, while 'leaning to an agreement with the State court,' exercise an independent judgment as to the validity and meaning of such contract, although the meaning and validity of State statutes may be an element in the case, and will not be bound to follow opinions of the State court construing such statute if such decisions were rendered after the rights involved in the controversy originated."

In Burgess *v.* Seligman, cited above, the court declined to follow the supreme court of Missouri in respect to the interpretation of a statute of that State, the decision having been made after
58 the transaction in controversy had arisen. Justice Bradley, in that case, speaking for a unanimous court, said:

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transaction in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the State tribunals contrary to that given by the circuit court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the

course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special con-
59 sideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail."

This case does not fall under the first class of exceptions stated above. The Ohio mechanics' lien statutes, prior to the amendment of April 13, 1894, only gave a lien to creditors of the principal contractor for labor or materials furnished at his instance upon such balance as was due from the owner to the contractor when notice was given of the claim to a lien. Such statutes are in the nature of mere garnishee proceedings, whereby the creditors of the contractor are substituted to the lien of the contractor.

Copeland *v.* Menton, 22 Oh. St., 398.
Dunn *v.* Rankin, 27 Oh. St., 398.
Bullock *v.* Horn, 44 Oh. St., 420.
Stark *v.* Simmons, 54 Oh. St., 435.

The last case cited was one in which the owner was permitted to set off his debt to the contractor by a claim he held against him when the contract was made, and thus defeated the effort of laborers to assert a lien against the owner.

The cases of Railway Co. *v.* Cronin, 38 Oh. St., 122, and Railway Co. *v.* McCoy, 42 Oh. St., 251, were suits under a statute giving liens to those contributing labor or materials to the construction of a railway. It does not appear that the principal contractor had been paid and no constitutional objection to the law was urged or decided.

Smith *v.* Parsons, 1 Ohio, 236, and Weil *v.* State, 46 Ohio, 450, presented no question as to any mechanics' or other lien statute, and the opinions are mere applications of the rule that contracts are made upon the basis of the existing law, and that a statute which operated only upon future contracts was, therefore, not legislation impairing the obligation of contracts. While these decisions have a bearing upon the general question of the legislative power to impress a lien upon the property of an owner in favor of those having no direct contractual relation with him, yet they do not constitute judicial decisions directly bearing upon the law with reference to which complainants may be said to have contracted. There has, therefore, been no such change of opinion by the supreme court of Ohio as to bring into operation the rule that the rights of the parties are to be determined according to the law as it had been judicially declared when the contract was made.

This brings us to the question as to whether the Ohio legislature exceeded its constitutional powers in providing that subcontractors and materialmen should have a lien, limited in extent by the original contract price to be paid the contractor, upon the
60 building and land of the owner, to secure them for labor and materials furnished at the instance of the contractor. The facts of this case are such as to entitle the complainants to demand from this court an independent judgment and expression of opinion as to the validity of the Ohio statute under which their transactions were had and under which they claim a lien.

With every disposition to come to an agreement with the views of the supreme court of Ohio, in the interest of harmony of decision, we are nevertheless compelled to express our inability to assent to the conclusions of that learned and impartial tribunal as to the validity of the legislation under which complainants' rights are claimed. The decision of that court was not placed upon any merely local or peculiar provision of the constitution of Ohio. The ground upon which they placed their objection to the law was, that it was an unreasonable and oppressive restraint upon the owner's liberty of contract.

"The owner," said the Ohio court, "has the right to acquire his building upon the best terms possible, and if he can by making a contract to pay in advance, or by exchange of securities or other property, acquire his building cheaper than by contracting to pay after four months from its completion, he has the inalienable right to so acquire it, and to be protected in its enjoyment, and it is not

within the power of the General Assembly to compel him to pay a higher price for his building, for the protection of laborers and furnishers with whom he has no contractual relations. To enable the contractor, by force of this statute, to enlarge the price to be paid by allowing liens to be taken on the property for labor and materials, would be as unjust as to authorize the owner, by statute, to enlarge the building, without a corresponding increase in payment." 55 Oh. St., 423-442.

In answer to the argument that the contract was made with the statute before him, and thereby made the law a part of the contract itself, and consented that those who furnished labor or materials to the contractor for his use would have a lien, the court said:

"This begs the question, and assumes the constitutionality of the statute. If the statute is valid it must be read into the contract, but if invalid it binds neither party, and does not become a part of the contract." This restraint upon an owner's liberty of contract the learned court said was prohibited by those declarations of the Ohio bill of rights, which declare that among the inalienable rights of man is "the right of enjoying and defending his life and liberty, acquiring, possessing and defending property and seeking and obtaining happiness." Touching the fundamental rights thus enumerated and their application to the law under consideration, the court said:

"It is worthy of notice that the Constitution is established to secure the blessings of freedom, and to promote the common
61 welfare. As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the General Assembly, under the powers conferred by that instrument, are to be such as shall secure the blessings of freedom and promote our common welfare. To make this more emphatic, the first section of the bill of rights provides that "all men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety." And by the second section it is provided that "all political power is inherent in the people. Government is instituted for their equal protection and benefit." The usual and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract, when made and entered into, cannot be impaired by act of the General Assembly. Article 2, section 28. The word "liberty," as used in the first section of the bill of rights does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. People *v.* Marks, 99 N. Y., 377; 52 Am. R., 34; Bertholf *v.* O'Reilly, 74 N. Y., 15; 30 Am. R., 323; Matter of Jacobs, 98 N. Y., 98; 50 Am. R., 636.

"Contracts and compacts have been entered into between men

tribes, and nations during all time, from the earliest dawn of history, and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our constitution, and it may be restrained only in so far as it is necessary for the common welfare, and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common public welfare, and equal protection and benefit of the people must appear, not only to the General Assembly, by force of popular clamor, or the pressure of the lobby, but also to the courts, and it must be so clear that a court of justice in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people. People *v.* Gillison, 109 N. Y., 389; 4 Am. R., 465. The statute in restraint of the liberty to contract as to interest on money is valid for the reason that all can see that it is for the common welfare. Many other like cases of restraint as to contracts are to be found in our statutes, but all of them, in so far as they are valid, depend for their validity upon the same principle. It was the infringement of the liberty of contract that induced this court in State *v.* Lake Erie Iron Co., unreported, to hold the statute unconstitutional which required corporations to pay their employés at least twice in each month. Our exemption laws can be sustained only
62 on the ground, that while they in a slight degree limit the liberty of contract, such limitation is for the general welfare of the whole people, and does not interfere with their equal protection and benefit. In such cases courts can see that the slight restraint of the liberty of contract is for the common welfare of the people, but no court can see that it is for the common public welfare that the liberty of contract should be taken away from the owner of a building to enable the seller of materials to collect their value from a man who never purchased them, and has already fully paid the one with whom he contracted for all that he has received. There can be no public necessity for making the contractor the agent of the owner, to enable the seller of materials to collect his pay from one who does not owe him, and with whom he has no contract."

We have made these copious extracts from the opinion for the purpose of indicating that the case did not turn upon any constitutional principle peculiar to Ohio. The "rights" supposed to be violated are rights deemed fundamental under all forms of popular and constitutional government and like declarations are to be found in all or most of our State constitutions. The question is, therefore, one of general law, having as much reference to the constitution of any other State as to that of Ohio.

In the case of Whiting *v.* Fond du Lac County, 25 Wis., 188, it was held that under the constitution of Wisconsin a tax could not be constitutionally laid in aid of the building of a railroad. The Supreme Court of the United States refused to follow this as a decision obligatory upon it in a case involving the validity of an act of the Wisconsin legislature authorizing a tax in aid of a railroad.

Upon the question as to whether the decision was one of local or

general law the court, in Olcott *v.* The Supervisors, 16 Wall., 678–690, said:

"This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other State as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single State tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State can conclusively determine for us. This consideration alone satisfies our minds that Whiting *v.* Fond du Lac County furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect."

In support of the conclusion reached by the Ohio court
63 there have been cited but two cases; Sprey Lumber Co. *v.* Sault Ste. Marie Savings Bank, 77 Mich., 199, and Waters *v.* Wolf, 162 Pa. St., 153. The Michigan case cited involved the validity of the Michigan act No. 270, Michigan Laws of 1887. The act was held void. The second section of that act provided that the lien given to subcontractors or materialmen should "not be defeated by any contract, agreement, or understanding between the owner, part owner, or lessee of the real estate upon which such improvements are made, or for which such materials are furnished, and the original of any subcontractor, by any payment made by such owner, part owner or lessee to such contractor or subcontractor for the contract price of such labor or material, or any part thereof." The court said such a law "strikes at the foundations of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. He may pay in full, in advance, or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials, and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter, except as a fact which binds no one, and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer." The case cites no authorities and states no particular provision of the constitution of Michigan which was violated.

The state of the decisions in Pennsylvania is quite peculiar. Under the mechanics' lien act of 1803 and 1806, it was held that the owner of any interest in the land upon which the improvement was placed could by his contract bind the land in its entirety.

Savoy *v.* Jones, 2 Rawle, 343.

In the case cited, Gibson, C. J., thus stated the ground upon which such a result was to be justified:

"The object of the legislature was to enable the mechanic or materialman to follow his labor or material into the building, which is pledged for the price, without regard to the estate of the owner. Did the lien proceed from a contract with the owner, the argument drawn from the apparent injustice of permitting a tenant for life to affect the estate of the remainderman, who was not a party, would not be destitute of plausibility. But there is no real injustice in the matter, the owners of the several parts of the fee being proportionately benefited; and it is consequently just that the whole should bear the burden."

By the later acts of 1836 and 1845 it was provided that a lien should exist in favor of all debts contracted by the owner or contractor for labor or materials. This legislation was upheld upon the theory that the contractor was by implication made the
64 agent of the owner to fasten a lien upon the building and the owner's land for debts contracted for labor and materials.

Harlan *v.* Rand, 27 Pa., 511.
Singerly *v.* Doer, 62 Pa., 9.
Duff *v.* Hoffman, 69 Pa., 191.

Adhering to this idea of an implied agency of the contractor for the owner, it was held in Schroeder *v.* Galland, 134 Pa., 277, that a subcontractor or materialman could have no right against the owner not founded on the contract between the owner and his contractor. That the agency of the owner was special and limited by his contract of which all who give him credit must take notice, and that if he contracted that neither himself nor any other should have a lien, that none could be claimed by subcontractors or others.

In Taylor *v.* Murphey, 148 Pa. St., 337, it was held that a stipulation by the contractor that he "will release and discharge the said houses from the operation of all liens," etc., was not a waiver of the right to enter a lien, or a covenant that none should be entered, but only a personal undertaking on the part of the contractor to settle any liens that might be filed before demanding payment of the balance due upon his contract, and that, therefore, subcontractors had acquired valid liens. To meet the ruling in Schroeder *v.* Galland, and cases following it, the act of 1891, was passed. That act provided that the owner should make no contract with the contractor which should operate to defeat the rights of subcontractors and materialmen to file liens, and that all subcontractors should have a lien notwithstanding any stipulation to the contrary in the contract between the contractor and owner unless consented to in writing by such subcontractors.

In Waters *v.* Wolf, 162 Pa. St., 153, a lien was asserted by a subcontractor who had not consented to a stipulation by which the contractor was to neither have nor create any lien in favor of others. The court, in an elaborate opinion, held the act of 1891 invalid, as an unauthorized restraint upon the right of "acquiring, possessing

and protecting property," and not within the delegated powers of the legislature.

The Ohio act involved here contains no provision expressly prohibiting an agreement limiting the supposed agency of the contractor for the owner, or restraining him from creating any lien, such as was contained in both the Michigan and Pennsylvania statutes. If such acts are properly to be regarded as constituting the contractor a special agent for the owner, to which he consents by making a contract with the law before him, it would seem that the Ohio act would be valid, there being no inhibition of an agreement withholding such power, and no intimation that the hotel company, in this instance, limited the implied agency of the contractor. Certainly the Pennsylvania decisions give no support to the de-
65 cision of the Ohio court that the Ohio act is void. Under the settled line of decisions in Pennsylvania the Ohio act is valid. In the last Pennsylvania case, that of Waters *v.* Wolf, cited above, the court announces its adherence to the long line of decisions upholding just such a statute as the Ohio act involved here, saying:

"In the absence of an express contract against liens, with a statute before him giving a lien to those with whom he contracted, the consent of the owner that a remedy given by law should be enforced under the contract was certainly to be implied."

In all or nearly all of the States there are statutes intended to give liens to those who contribute labor or materials to the enhancement or improvement of the land or buildings of an owner.

These statutes vary in their character and purpose. Originally they were chiefly acts giving a lien to persons having direct contractual relations with the owner. Such statutes did not protect those who contributed to the improvement through dealings with the contractor, and were soon followed by statutes extending the lien to persons not contractually connected with the owner, but who furnished labor or materials for the building through contracts with the principal contractor. This was accomplished in two ways:

1. By giving to creditors of the contractor a derivative lien, whereby they were substituted to the rights of the contractor as they existed when notice was given of the claim. Such statutes were in the nature of mere garnishee or attachment proceedings, and were subject to no criticism as doing injustice to the owner. Payment in advance was a defense under all such statutes, for the contractor's creditors could stand in no better situation than he did. So, if he had no lien, his creditors had none, as their utmost right was to be substituted to the contractor's place.

2. Or by statutes which gave to those who furnished such labor or materials to the contractor a direct or independent lien upon the building and land of the owner. Under these, payments to the contractor prior to expiration of the time within which notice might be given were ineffectual, the lien not being a derivative one, but independent of that given the contractor. Some of these statutes sought to diminish the severity of this legislation by limiting the aggregate of such liens to the original contract price; or, by pro-

viding for a contractor's bond for the benefit of the owner with summary remedy thereon, or by both. The verbiage of statutes of the latter class varies. In some the contractor is declared to be the agent of the owner, and as such authorized to obtain labor and materials upon the credit of the owner or his building and land, or both.

In a large number of cases the question of the constitutionality of acts extending the lien to subcontractors and others having no direct contractual relation with the owner has been brought in question and the validity of the legislation upheld. In still other instances, such acts have been enforced without question
66 as to their constitutionality. We cite a number of cases, though by no means all, in which acts involving questions identical with those raised by the Ohio statute have been enforced either after their validity had been challenged or *sub silentio*.

In New York the constitutionality of an act like the Ohio act was twice raised and twice decided favorably to the lien.

Blauvelt *v.* Woodworth, 31 N. Y., 284.

Glacius *v.* Black, 67 N. Y., 563.

In Blauvelt *v.* Woodworth, *supra*, payments made to the contractor in advance of the time within which liens might be filed were held to have been made at the peril of the owner, and a sale of the premises by the owner, after the completion of the building, but before notice and within the time within which notice might be given, were held ineffectual to defeat the lien of the materialmen. Touching the constitutionality of a law which brought about such consequences, the court said:

"There is no provision of the constitution which precludes the legislature from declaring a statutory lien, in respect to future contracts, in favor of either the contractor, the subcontractor or the laborer, upon the land of the owner, at whose instance and for whose benefit the services are performed. The act of 1852 was in force when the contract in question was made; and every contract is presumed to be executed with reference to existing laws, and subject to such modification, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection."

And in Glacius *v.* Black, *supra*, the constitutional objection was again urged. The court said:

"The constitutionality of the legislation known as mechanics' lien laws, was affirmed in Blauvelt *v.* Woodworth, and the court held that there was no constitutional objection to the creation, by the legislature, of statutory liens, in favor of mechanics and others, for the purposes and under the circumstances and limitations specified in these statutes. Laws of similar character have been in force in this State for more than forty years (Laws of 1844, chap. 220); and similar legislation is found on the statute books of many of the States. These statutes have been frequently under considera-

tion by the courts, and so far as we know, their constitutional validity has never been judicially questioned."

In Minnesota similar statutory liens have been enforced. O'Neil *v.* St. Olaf's School, 26 Minn., 329; Bohn *v.* McCarthy, 29 Minn., 23; Laird *v.* Noona, 32 Minn., 358. In the case last cited, the constitutionality of the law was elaborately considered by the court. Among other things, the court said:

"As such liens are incumbrances upon the owner's title, they can only be created by his consent or authority; and it is upon this ground that such legislation is supported. The statute annexes the lien as an incident to the contract of the owner with the con-
67 tractor or builder, and such contract is the evidence of the authority of the latter to charge the building and land with liabilities incurred by him in performing his contract." "The owner consents to this power conclusively and irrevocably, so far as others than the builder are concerned, by making a contract while such is the law."

That liens for an amount in excess of the contract price of the improvements or building might be asserted, was held to be no objection. On this subject the court said:

"As respects the amount which may thus be secured, their rights are not dependent upon or limited by the amount due the contractor from the owner under the original contract, nor by the state of the accounts between them. It is sufficient that the liens are created through the owner's contract, from which his consent is implied. To avoid the incumbrance of such liens the owner takes the burden of securing the bond which he is authorized by the act to take. Whether the burden of taking such proceedings for his own protection should thus be cast on him, or whether subcontractors and laborers should be left to proceed against the amount due, as under the former practice, was entirely a question of legislative policy. And this is sufficient to dispose of the objection that the law unreasonably limits the exercise of the owner's discretion as to the persons whom he shall contract with; that is to say, to such as can give bonds or are financially responsible for the contracts they may make in the prosecution of the work. It is strictly in conformity with the policy which allows a lien in any case. It does not take away or affect the rights of the owner any further than it may be necessary for the security of those who are presumed to have added something to the owner's property equal to the expenses incurred." Spofford *v.* True, 33 Maine, 283; Taggard *v.* Buckmore, 42 Maine, 77. "It is ordinarily understood from the nature of the case, that under building contracts the work is not to be done wholly by the contractor; and it is a sound and just principle that all those who have, by consent of the owner, or in pursuance of contracts with him for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services have been discharged."

In Wisconsin such an act was sustained over an earnest dis-

sent by Judge Cassady. Mallory *v.* La Crosse Abattoir Co., 80 Wis., 170.

In Missouri the case of Henry *v.* Rice, 18 Mo. App. Rep., 497, was overruled and the validity of the act sustained in an able opinion by Judge Barclay. Henry *v.* Evans, 97 Mo., 47.

In Massachusetts an act which did not expressly extend the lien to subcontractors or workmen was held to give a lien upon an implied agency of the contractor. In Parker *v.* Bell, 7 Gray, 420, the court construed an act which provided that "any person who shall actually perform labor in erecting, altering or repairing any
68 building or structure upon real estate, or shall furnish materials actually used for the same, by virtue of any agreement with or consent of the owner thereof, or other person having authority or acting for such owner to procure labor or furnish materials in his behalf, shall have a lien upon such building or structure, and upon the interest of the owner of the building or structure in the lot of land upon which the same is situated, to secure the payment of the amount due him for such labor and materials;" and gave to a plasterer employed by a subcontractor an independent lien, the court saying:

"That the employment of a principal contractor to build a dwelling-house for a definite and fixed compensation operated to authorize the latter to do all acts necessary and proper to enable him to fulfill his contract and to complete the tenement to be erected. It was, of course, understood between the parties that this work was not to be wholly and in every part done by the contractors with their own hands. They were fully empowered to employ, in the execution of the contract, the necessary workmen, and to cause their labor to be faithfully applied in fulfilment of its provisions. The consent of the respondents to such employment of laborers, and such application of their labor, is a necessary and inevitable implication from the contract under which the house was to be erected. The labor, therefore, which was actually performed by the petitioners, in doing the plaster and stucco work of the house, and which was a necessary part of the construction, having been rendered by virtue of an agreement with Whittemore & Currier, must be considered to have been performed with the consent of the respondents. It was done for their benefit, and under stipulations into which they had entered, by force of which they were entitled to insist that the contract should be fully performed."

In Donahy *v.* Clapp, 12 Cush. (Mass.) Reports, 440, Shaw, Ch. J., for the court, said, concerning the theory upon which the subcontractor might acquire a lien upon the land of the owner: "Such liens in favor of subcontractors would equally bind the estate by consent of the owner; because such a contract, by force of the existing law, when it was made, of which the owner is presumed to be conusant, gives his irrevocable power to his contractor, to charge and bind his estate; and when such power is executed by the actual making of such subcontract for labor it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor."

In Bowen *v.* Phinney, 162 Mass., 593, Holmes, judge, said:

"Our statute gives an immediate lien to one who has performed labor in the repair of a building by the consent of the owner. Even if he is employed by a contractor, the laborer's lien is not by way of subrogation, and does not depend upon the terms of the contract or the state of the account between his employer and the owner of the land."

In Tennessee just such an act was upheld though most
69 vigorously assailed as beyond the legislative power. In answer to some of the objections urged, Justice Caldwell, in Cole Mfg. Co. *v.* Falls, 90 Tenn., 466, said:

"It is true that a lien is provided for persons with whom the owner is supposed to have no direct contractual relations, but that fact alone does not invalidate the act; for the owner must be held to a knowledge of the existing law on the subject, and to the presumption that he employed the original contractor and gave out his work with reference to that law. The right of lien to subcontractors and materialmen is, by operation of law, incorporated into and made a part of the owner's contract as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor. The law declares that a lien shall exist in favor of the subcontractor and materialman in certain contingencies; hence, the owner who makes the contemplated contract cannot justly complain of the legal result, especially when he derives the benefit of the labor and material of those for whom the lien is provided, and who often have no other means of compensation. The enforcement of this law does not necessarily result in loss to the owner, nor take from him something for nothing."

In Colter *v.* Frese, 45 Ind., 96, the validity of such an act was most learnedly vindicated by Judge Warren, who delivered the unanimous opinion of the court.

Stewart *v.* Wright, 52 Iowa, 335, has been referred to as questioning the validity of such legislation. The case does not so decide. It turned upon the construction of the act which the court interpreted as giving a lien only upon the balance due from the owner when notice of the subcontractor's lien was filed. The judge, writing the opinion, does intimate a doubt as to the power of the legislature to subject the owner to debts of a contractor who had been paid in full before notice. But no such question was involved or decided.

The California act of March 30, 1868, gave to materialmen and laborers a lien upon a building to secure the amounts due them, "whether done or furnished at the instance of the owner of the building, or other improvement, or his agent; and every contractor, subcontractor, architect, builder or other person having charge of any mining, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act."

In Hicks *v.* Murray, 43 Cal., 515, the constitutionality of this act was assailed, but the court in an opinion of a few lines, said they thought the act was constitutional.

In the subsequent case of Renton *v.* Conley, 49 Cal., 185, the court construed the act as limiting the lien to the amount due
70 from the owner to the contractor under the contract at the time notice of the filing of the lien was given the owner, but no constitutional question was raised or decided.

In Maine like statutes, giving liens to subcontractors and materialmen who gave notice within the time fixed by the statute, have been enforced and their constitutionality maintained upon the ground that they applied only to future contracts, and that all building contracts were made subject to the provisions of the statute.

Spofford *v.* True, 33 Maine, 283.
Atwood *v.* Williams, 40 Maine, 409.
Taggard *v.* Buckmore, 42 Maine, 77.

In Atwood *v.* Williams, *supra*, the lien of the materialman was enforced, although the owner had made full payment to the contractor after the completion of the building and before notice of the claim to a lien was filed.

In Gurney *v.* Walsham, 16 R. I., 699, the constitutionality of such an act was affirmed upon the ground that the contract was made and entered into subject to its provisions. The defense that the owner had paid all that he owed the contractor before notice of claim of lien by materialmen, was not sustained.

In Virginia similar acts have been held valid: Roanoke, etc., Co. *v.* Karn, 80 Va., 589; N. & W. R. R. Co. *v.* Howison, 81 Va., 125.

So in Washington: Spokane Co. *v.* McChesnay, 1 Wash. Rep., 609. And in Connecticut: Paine *v.* Tillinghort, 52 Conn., 632. And in Maryland: Frensch *v.* Shyrock, 51 Md., 162.

The direct question as to the constitutionality of acts extending a lien to subcontractors and materialmen furnishing materials at the instance of contractors has not arisen in the Supreme Court of the United States nor in any of the United States courts of appeals, so far as we have been able to discover.

At act of Congress of March 2, 1833, 4 Stat. at Large, 695, gave a lien in the District of Columbia upon buildings to all who do work or furnish materials on order of the contractor, who should give notice to the owner within thirty days after being employed to do the work or furnish materials that they claimed such lien. In Winder *v.* Caldwell, 14 How., 434, this act was construed as not giving a lien to the principal contractor. The court said:

The contractor, though mentioned in the act, is not enumerated among those entitled to its benefit. The aim and policy of this statute is also obvious. Experience has shown that mechanics and tradesmen, who furnish labor and materials for the construction of buildings, are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor

of the mechanic and the materials are incorporated into them, the owner becomes insolvent, and sells the buildings, or encumbers them with liens; and thus one portion of his creditors are paid at
71 the expense of the labor and property of others. Or, the insolvent owner, who builds by the agency of a contractor or middleman, pays his price and receives his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is not to secure contractors, who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor, that gave rise to the system, but the protection of those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated. But the contractor is neither within the letter nor the spirit of the act."

In Grant *v.* Strong, 18 Wall., 623, and McMurray *v.* Brown, 91 U. S., 258, and Van Stone *v.* Stillwell & Brice Mfg. Co., 142 U. S., 128, the question of waiver of the lien given under various State statutes was considered. In considering the character and nature of the lien the court, in McMurray *v.* Brown, 91 U. S., 258–266, said:

"Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis that, if the stipulated labor is performed or the promised materials are furnished, the laborer or materialman is entitled to the lien which the law affords, provided he gives the required notice within the specified time."

In Van Stone *v.* Stillwell & Brice Mfg. Co., 142 U. S., 128–136, it was said:

"It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the materialman and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to, the statute."

In Central Trust Co. *v.* Condon, 31 U. S. A., 387–422, a lien in favor of subcontractors was enforced against mortgagees by this court. Judge Taft, in delivering the opinion of the court touching the character of the lien, said:

"A subcontractor's lien under the statute is not dependent on the principal contractor's having perfected his lien. Green *v.* Williams, 8 Pickle (Tenn.), 220. It is independent of, and superior to, his lien, and is only limited by the amount due to the principal contractor at the time of the service of notice by the subcontractor on the railroad company. Therefore the assignee of a principal contractor's lien is junior to the subcontractor who has perfected his statutory lien."

72 In Central Trust Co. *v.* Richmond, etc., R. Co., 31 U. S. A., 675–688, we enforced a lien in favor of such subcontractors arising under a Kentucky statute. Touching the origin and nature of the lien, we said:

"It is not a lien originating in a contract for a lien, but arises out of the statute independent of any agreement for a lien, and is based upon the equity of paying for work done or materials delivered." * * * "The clear purpose of the Kentucky statute was to make the liens of the contractor and subcontractor independent, direct liens, the latter limited only by the amount of the original contract price. The lien of the subcontractor does not spring out of the lien of the contractor, and, is not derived therefrom or subordinate thereto. The aggregate of all the liens is not to exceed the contract price agreed to be paid by the owner, but this limitation concerns not the fact of a lien, but the extent thereof. Being a direct lien, its existence does not depend upon the existence or non-existence of a contractor's lien, and the waiver of a lien by a contractor will not affect the subcontractor's lien."

In neither of these cases, though the amounts involved were great, was any constitutional objection to the statute giving the lien suggested, though very eminent counsel appeared in each case. The constitutional validity of statutes giving an independent lien has the support of most of the text-writers.

2 Jones on Liens, 286; Phillips' Mechanics' Liens, sec. 30; Boisot on Mechanical Liens, secs. 22, 23.

Overton on Liens, section 553, has been cited as advancing a contrary view.

If we had doubt as to whether such statute was "due process of law," or violated the fundamental right of owning and enjoying property, or unreasonably restrained liberty of contract, we should be disposed to yield to the current and weight of authority upholding such acts as valid and constitutional. No court is justified in striking down an act of legislation unless it is clearly satisfied that the act is in conflict with the organic law limiting the power of the legislative branch of Government. Such statutes have met with the approval of the legislative bodies of nearly every State in the Union, as well as of Congress, as indicated by the act of 1833, construed in Winder *v.* Caldwell, 14 How., 434. They have survived assault whenever the question has arisen, save in Ohio and Michigan, and to a limited degree in Pennsylvania, and in a still larger number of instances have been enforced without question as to their validity.

But the validity of such statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice and most often administer an equity which has recognition under every system of law. That principle is, that every one who by his labor or materials has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation.

73 This strong natural justice has given rise to a variety of liens recognized by the common law. Thus, without any

agreement the common law gave to one who by his labor or expense has made, preserved, enlarged or repaired a chattel, a lien thereon for his security, which he may, however, lose if he surrender possession. So, we find another illustration in the lien given one who in the exercise of a quasi-public employment is required to receive or perform some service in respect to the thing upon which the lien is given. That the owner who sells his chattel shall not be required to part with it until the price is paid rests upon the justice of the matter and not upon any agreement. But the remedies prescribed by the common law by no means embrace the numberless instances in which the inherent right of the matter requires that a charge or lien should be recognized as arising out of the nature of the transaction, independently of any agreement. That wide class of trusts arising out of the conduct of the parties, either with or without intention, but without express words of creation, which we call constructive or implied trusts, rest upon the natural justice which will not permit one to retain that which in justice does not belong to him and therefore fastens upon the thing, or that into which it is traced, a charge or lien in favor of the equitable owner. So, the vendor of realty may ordinarily, without any express agreement, apply the property sold to the payment of the price. There are a large variety of cases where a lien has been recognized as arising out of the nature of the transaction although there was no direct contractual relation between the parties affected. Thus, in the maritime law the last lien created by the master of a ship for supplies or repairs is entitled to preference over prior liens; the principle being that the common pledge has thereby been preserved for the common benefit. So, he who rescues goods from capture or the perils of the sea has a lien thereon for his compensation. The meritorious character of a claim often displaces prior burdens, as in the case of supplies and labor furnished a mortgaged railway company to keep it in operation and preserve the property for the benefit of all interested.

Whoever takes and holds possession of land to which another has the better title is liable to the true owner for the rents and profits, and no distinction is recognized between a *bona fide* and *mala fide* possession. Green *v.* Biddle, 8 Wheaton, 1, 74. But this was a harsh rule when applied to a case where the rents and profits had been offset by lasting improvements which had actually increased the value of the land. Courts of equity, therefore, soon applied the principle that where the owner resorted to a court of equity for an account of rents and profits, the permanent improvements should offset the liability of the possessor if his possession and improvement were in good faith.

2 Story Eq. Juris., secs. 799*a*–799*b*–1237–1239.

In Bright *v.* Boyd, 1 Story, 478, and Fed. case No. 1875, and same case in 2 Story, 605, Fed. case No. 1876, Justice Story laid
74 down the broad doctrine that a *bona fide* purchaser, without notice of defect in his title, who makes improvements upon the estate, has a lien upon the estate for the increased value, after

deducting rents and profits, and a court of equity will enforce this lien against the true owner who recovers the estate at law against such a purchaser. This case has been adopted and approved in Valles' Heirs *v.* Fleming's Heirs, 29 Mo., 152; Union Hall Ass. *v.* Morrison, 39 Md., 281, and Hatcher *v.* Briggs, 6 Oregon, 31; though it cannot be said to have received any very general support, though often cited The reason is doubtless found in the fact that the equities of *bona fide* purchasers of defective titles were so generally recognized as to result in statutes in most of the States, called betterment or occupant statutes, which provide that a *bona fide* occupant making lasting improvements in good faith shall have a lien upon the estate recovered by the true owner to the extent that his improvements have increased the value of the land. Though the operation of these statutes is to make the true owner pay for improvements made against his will and which he might not desire, the courts have sustained their constitutionality as giving remedy where before there had been none, though a strong equity existed.

Cooley Cons. Lim., 486 *et seq.*; Brown *v.* Storm, 4 Vt., 37; Ross *v.* Irving, 14 Ill., 171; Griswold *v.* Bragg, 48 F. R., 519; Hunt's Lessee, 5 Ohio, 132; Scott *v.* Mather, 14 Texas, 235; Davis *v.* Powell, 13 Ohio, 308; McCoy *v.* Grandy, 3 Ohio St., 463; Bacon *v.* Callender, 6 Mass., 303; Welch *v.* Wodsworth, 30 Conn., 149; Whitney *v.* Richardson, 31 Vt., 300.

The constitutionality of a similar Tennessee act was denied in Nelson *v.* Allen, 1 Yerger, 376; but Chief Justice Catron, in a note, says the question did not arise.

Not only was the equity so broadly declared and enforced by Justice Story in Bright *v.* Boyd, *supra*, recognized and enforced by the civil law, but in that system of law very high consideration was given to all who had by their contributions benefited, preserved or enlarged the estate or property of another, and among creditors secured by a common pledge or mortgage those whose contributions were given and used for the benefit of the thing hypothecated were privileged, and among this class those whose contributions were last given and used had the preference.

Mackeldy's Roman Law, 280, 281.

Domat says: "Among creditors who are privileged, it does not matter which of them is first or last in order of time, for they are distinguished only by the nature of their privileges." Domat Civil Law by Strahon, 681. Thus, he who had sold an immovable thing, was privileged for the price, before the creditors of the purchaser, and all others as to the thing sold. So he who loaned money to a purchaser to pay the purchase price, had the same privilege as the seller would have had till he had been paid. He who loaned
75 money to preserve the thing, or to make an improvement of an estate had a like privilege. Domat Civil Law by Strahon, 682–683. This equity was, by the civil law, extended to all who had contributed to the preservation, repair, enlargement or creation of an improvement on land. This privilege is thus stated by Domat, p. 683, section 1744:

"Architects and other undertakers, workmen and artificers, who bestow their labor on buildings or other works, and who furnish materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have the same privilege for their salaries, and for what they furnish, as those who have advanced money for these kinds of works, and which the seller has for the price of the thing sold."

None of these instances from either the civil or common law of a charge or preference are dependent upon an express agreement for such privilege over other creditors. They have their basis in the nature of the transaction. Statutes which give to a contractor or materialman, dealing directly with the owner, a lien on the building or land, do so independently of any agreement for a lien, but their validity has never been doubted. Yet the basis for the interposition of a lien is the mere equity in favor of him who by his labor or materials has benefited the owner, and has acquired therefore an interest in the property benefited to secure his just compensation.

In most instances it is well understood that the contractor will employ others to aid in or do the work and to furnish the materials necessary. The earlier statutes did not extend any protection to those who should be thus employed by the contractor. To remedy this, some statutes gave to such subcontractors, workmen, or furnishers of materials, a mere derivative lien, by which they might be substituted to the lien and claim of the contractor. In others, an independent lien was given to all who should at the instance of the owner or his contractor contribute toward the completion of the work either labor or materials. Of this character is the Ohio statute under consideration. Such statutes rest upon the principle of natural justice which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who at the instance of his contractor shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts it cannot be said to impair the obligation of a contract.

If the law be subject to no other objections, it impairs no
76 contract, for all thereafter made are entered into upon the basis of the law. "The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect."

Edwards *v.* Kearzey, 96 U. S., 595; Greenwood *v.* Freight Co., 105 U. S., 13; Denny *v.* Bennett, 128 U. S., 489; Smith *v.* Parsons, 1 Ohio, 236; Weil *v.* State, 46 Ohio St., 450.

Neither can the owner be said to be thereby deprived of his prop-

erty without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law.

Provident Institution *v.* Jersey City, 113 U. S., 506–514.

If then this statute does not unduly restrain the owner's liberty of contract, considered as an incident to the right of owning, possessing and enjoying property, the law must be constitutionally unobjectionable. If, however, this legislation is the mere arbitrary exercise of the powers of government, unauthorized by the established principles of private right and not having the sanction of natural justice, it is not the law of the land. But we have already seen that the underlying purposes of the act is not to arbitrarily and unnecessarily oppress the owner in any incident of his right as owner, but to secure to those who by their labor or materials have contributed to the improvement of the owner's property. That the liens under consideration are given to secure debts which are primarily the debts of another, would be fatal to the legislation as taking the property of one to pay the debts of another, but for the equity arising from the use of the labor and materials by the owner. It is in this connection of the owner with such debts that the justice of the statute is found. In paying off such claims the owner may, if he exercise proper precaution, pay only his own debt to the contractor. If he be required to pay such subcontractors when nothing is due the principal contractor it is his own fault.

That the liability of the owner in respect to building contracts is restrained in some degree by this statute must be admitted. If he pay in advance, or contract to pay in property, or by an exchange of paper, and his contractor be dishonest or insolvent, he may find himself involved by the contractor's debts for labor or supplies. This contingency he may not always be able to guard against. But as much may be said of those who furnish labor or materials at the instance of the contractor. Without the lien they must look alone to the contractor, and may not always be able to protect
77 themselves. Inasmuch as the owner actually gets the benefit of their contributions to his property, their equity is a strong one, and the legislature has, in its discretion, determined to cast upon the owner the responsibility of guarding against the defaults of a contractor selected by himself. To protect the class having this equity the making of building contracts has been regulated. The restraints upon the owner are neither arbitrary nor oppressive, nor are they, under this Ohio statute, any more onerous than required by the necessity of protecting those who actually do the work or furnish the materials by which the owner is benefited. To permit such persons to follow and recover their contributions in kind would be futile to them and disastrous to the owner. A law which has for its basis equitable principles which in all times and

in all ages have had recognition, cannot be arbitrary and oppressive to the extent of exceeding the boundary of legislative discretion. Restraints upon liberty of contract are constantly met with in the legislation of every State. Statutes requiring certain contracts to be in writing, or to be witnessed, or acknowledged, or registered; statutes regulating interest, or the time within which rights may be enforced, and statutes exempting property from liability to execution, are notable examples of statutes regulating and limiting contracts. No more striking example of interference with liberty of contract is afforded than the statute upheld by the Ohio court in Weil *v.* State, 46 Ohio St., 450. The statute there declared valid was one which regulated conditional sales of personal property, or sales upon the installment plan, and made the violation of one of its sections a misdemeanor.

The equity in favor of those to whom the benefit of the Ohio lien law is extended is in its nature comparable to many equities recognized by courts of chancery and in other systems of law. But it was an equity upon which there was no remedy. The statute gives one in respect to future contracts. We cannot say that the remedy is so arbitrary or oppressive, or so unreasonable, as to be an act in excess of legislative power. The right of him who by his labor and materials had contributed to the betterment of another's estate was an imperfect right, because it had not been done at the instance of the owner, though presumably with his knowledge and at the instance of his contractor. At the common law neither the owner nor his building was chargeable, there being no contractual relation. The statute recognizes the equity of such contributors, and has turned the imperfect into a perfect right, by prescribing the consequences of a building contract, and giving a remedy to all who at the instance of the contractor shall contribute to the performance of his contract with the owner. That legislation which is sanctioned by the dictates of natural justice can only be avoided by pointing out some specific provision in the organic law which has been violated by its enactment. Neither upon reason or
78 authority are we able to come to an agreement with the Ohio court. In the exercise of our independent constitutional jurisdiction, we must declare our conscientious judgment to be that the Ohio statute was not void, and that complainants are entitled to relief thereunder. The decree of the circuit court must be reversed. The demurrer will be overruled and the cause remanded for answer and further proceedings not inconsistent with this opinion.

79 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of Benj. F. Jones *et al.* against The Great Southern Fire Proof Hotel Co. and Sosman & Landis against The Great Southern Fire Proof Hotel Co., Nos. 535 & 536, October term, 1897, as the same remains upon the files

and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this twenty-eighth day of May, 1898.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

80 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Being informed that there is now pending before you suits in which Benjamin F. Jones *et al.* are appellants and The Great Southern Fire Proof Hotel Company is appellee, No. 535, and Sosman & Landis are appellants and The Great Southern Fire Proof Hotel Company is appellee, No. 536, which suits were removed into the said circuit court of appeals by virtue of appeals from the circuit court of the United States for the southern district of Ohio, and we being willing for certain reasons that the said causes and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
81 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said causes, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

I received the above writ this 14th day of March, 1899, and do hereby return the same pursuant to stipulation of counsel filed in this court, a duplicate copy of which is attached hereto and is as follows:

Supreme Court of the United States.

THE GREAT SOUTHERN FIRE PROOF HOTEL Company, Petitioner,
vs.
BENJAMIN F. JONES, GEORGE M. LAUGHLINS, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., Doing Business under the Firm Name and Style of Jones & Laughlins, Limited, and Others, Respondents.

Agreement to Dispense with an Additional Certified Copy of the Transcript.

It is hereby mutually stipulated and agreed by and between the undersigned parties, by their respective attorneys, that the certified copy of the transcript of the record and proceedings in the United States circuit court of appeals, sixth circuit, in the case wherein Benjamin F. Jones and others were appellants and The Great Southern Fire Proof Hotel Company was appellee, known on the dockets of said circuit court of appeals as # 535, and wherein Sosman and Landis were appellants and The Great Southern Fire Proof Hotel Company was appellee, known on the dockets of said circuit court of appeals as # 536, which transcript is now on file in the Supreme Court of the United States, in case # 711, October term, 1896, wherein The Great Southern Fire Proof Hotel Company is petitioner and Benjamin F. Jones and others and Sosman and Landis are respondents, in which said cause # 711 a writ of certiorari has been issued on the application of the said The Great Southern Fire Proof Hotel Company, may be taken as a return to the said writ of certiorari which issued out of the Supreme Court of the United States in the aforesaid case # 711 on the 6th day of March, 1899, and the undersigned do each respectively request the clerk of the United States circuit court of appeals, sixth circuit, to forward and certify a copy of this agreement with his return to said writ to the clerk of the Supreme Court of the United States.

J. E. SATER AND
D. F. PUGH,
Att'ys for Petitioner.
TALFOURD P. LINN,
Att'y for Jones & Laughlins, Limited.
GEO. K. NASH,
Att'y for Sosman & Landis.

In witness whereof I have hereunto set my hand and the seal of the United States circuit court of appeals for the sixth circuit this 14th day of March, 1899.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

82 [Endorsed:] 17,296 Supreme Court of the United States. No. 210, October term, 1899. The Great Southern Fire Proof Hotel Co. *vs.* B. F. Jones *et al.* and Sosman & Landis. Writ of certiorari and return. Filed Mar. 16, 1899.

Supreme Court of the United States

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, *Petitioner*,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLINS, HENRY A. LAUGHLINS, Jr., BENJAMIN F. JONES, Jr., DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JONES & LAUGHLINS, LIMITED, AND OTHERS, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

D. F. PUGH AND
J. E. SATER,
Attorneys for Petitioners.

COLUMBUS:
PRESS OF SPARE & GLENN,
1909.

Supreme Court of the United States

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, *Petitioner*,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLINS, HENRY A. LAUGHLINS, JR., BENJAMIN F. JONES, JR., DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JONES & LAUGHLINS, LIMITED, AND OTHERS, *Respondents*.

Petition for writ of Certiorari requiring the Circuit Court of Appeals for the Sixth Circuit, to certify to the Supreme Court for its review and determination the cases of Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, having their principal office and place of transacting business in the City of Pittsburg, in the State of Pennsylvania, and others, Appellants, against The Great Southern Fire Proof Hotel Company, a corporation, et al., Appellees.

To the Honorable Supreme Court of the United States:

The petition of The Great Southern Fire Proof Hotel Company respectfully shows to this Honorable Court as follows:

I.

Your petitioner is a corporation duly incorporated under the laws of the State of Ohio, and now is, and has ever been, since the date of its incorporation, a citizen of said State and of no other, having its residence and principal place of business in the City of Columbus in said State; that

the respondents (appellants below), Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., above named, are members of a limited partnership association, doing business under the firm name and style of Jones & Laughlins, Limited, which association was organized under the act of the General Assembly of Pennsylvania, approved June 23, 1874, entitled, "An Act authorizing the formation of a partnership association in which the capital subscribed shall alone be responsible for the debt of the association, except under certain circumstances," each and all of which members of said association have their office and place of business in the City of Pittsburg, in the State of Pennsylvania, and said limited partnership, or association, and the members thereof, are and for many years past have been, citizens of said State and of no other, residing in the City of Pittsburg, in said State of Pennsylvania.

That the respondents (appellants above), Joseph S. Sosman and Perry Landis, are partners doing business under the firm name and style of Sosman & Landis, having their principal place of business in the City of Chicago and State of Illinois, and are now and for many years past have been residents of said City and State, and of no other.

II.

Your petitioner, on the 10th day of October, 1894, made and entered into a contract in writing with one William J. McClain, as principal contractor, wherein and whereby the said William J. McClain, in consideration of the sum of three hundred and forty-five thousand dollars ($345,000), covenanted and agreed with your petitioner, that he would, at his own cost and expense, in a first-class, good

and workmanlike manner, and with first-class materials, and to the satisfaction and acceptance of your petitioner, do and perform all the proper and necessary work and labor, and provide and furnish all proper and necessary materials, machinery, apparatus, and tools for, and would construct and complete and make tenantable for your petitioner, a fire proof hotel and opera house building, in full and strict conformity with said contract and with the plans and specifications made a part thereof, and thereupon the said William J. McClain did forthwith proceed towards the construction of said improvement on your petitioner's real estate, which real estate is situate in the City of Columbus, Franklin County, Ohio, and is bounded and described as follows, to-wit: In-lots Nos. three hundred and fifty-two (352), three hundred and fifty-three (353), and three hundred and fifty-four (354), in said City, being one hundred and eighty-seven and one-half feet (187½ ft.) square, and bounded on the north by Main street, on the east by Pearl street, on the south by Noble street, and on the west by High street, in said City.

III.

Your petitioner further says, that on or about the 13th day of December, 1894, the said Jones & Laughlins, Limited, made and entered into a contract in writing with the said William J. McClain, who was the principal contractor with your petitioner, for the erection and construction of the aforesaid fire proof hotel and opera house building on the aforesaid premises, wherein and whereby it was provided that the said Jones & Laughlins, Limited, should furnish the said William J. McClain nine hundred (900) tons of structural steel for the said fire proof hotel and opera house

building, said structural steel to be fitted and ready for erection and to be furnished for the sum of thirty-two thousand five hundred and eight dollars ($32,508.00) f. o. b. cars, Columbus, Ohio, and further provided that if an additional quantity of steel be required more than the nine hundred tons named in said contract, that the said Jones & Laughlins, Limited, should furnish the same at the rate of $1.81 per hundred pounds delivered in said City of Columbus, or if a less amount be required than the said nine hundred tons, the said Jones & Laughlins, Limited, would allow a reduction from the contract price at the rate of $1.81 per hundred pounds for the difference between the amount shipped and the nine hundred tons above and in said contract mentioned; and said contract further provided that the said Jones & Laughlins, Limited, were to commence shipping said structural steel at once and that the order for the same should be completed before August 1st, 1895, and that the terms of payment for said structural steel so shipped should be cash to be paid on the 5th day of each month following shipment of said steel (page 10, printed record, Exhibit A).

IV.

Your petitioner further says, that in accordance with the terms of said written contract so made as aforesaid, between the said Jones & Laughlins, Limited, and the said William J. McClain, the said Jones & Laughlins, Limited, shipped and furnished to the said William J. McClain structural steel for said building alleged by the said Jones & Laughlins, Limited, to be of the value of forty-three thousand two hundred ninety-six and 74–100 dollars ($43,296.74), which structural steel was used by the said William J. McClain in and about the construction and erection of said fire proof hotel and

opera house building in the City of Columbus, and State of Ohio, and payments were made by the said William J. McClain to the said Jones & Laughlins, Limited, on account of the structural steel so furnished and shipped as aforesaid, in the sum of thirty-one thousand eight hundred eighty-six and 72–100 dollars ($31,886.72), leaving a balance as claimed by the said Jones & Laughlins, Limited, due to them from the said William J. McClain, of eleven thousand four hundred ten and .02–100 dollars ($11,410.02).

V.

On the 21st day of April, 1896, at 4 : 50 o'clock P. M., within four months after having furnished the last of said structural steel to the said William J. McClain, the said Jones & Laughlins, Limited, for the purpose of obtaining a mechanic's lien on the real estate, hotel building and opera house hereinbefore mentioned, and owned by your petitioner, duly filed with the Recorder of Franklin County, Ohio, an affidavit purporting to contain an itemized statement of the amount and value of the merchandise claimed to have been furnished by them under their contract with the said William J. McClain, with the credits thereon, and a copy of the said written contract between them and the said McClain, and also a description of the premises owned by your petitioner hereinbefore specifically described, and on which said fire proof hotel and opera house building were in process of erection, and caused said affidavit to be recorded in Book No. 9, pages 99, 100 and 101 of the Records of Liens of said Franklin County, Ohio, in which said affidavit the said Jones & Laughlins, Limited, claim that there was due them from the said William J. McClain on account of structural steel furnished by them to him, the said sum of eleven thousand,

four hundred ten and .02–100 dollars ($11,410.02), with interest from January 28th, 1896, and that they have a lien on the aforesaid premises of petitioner for said amount.

VI.

Your petitioner further says that on or about the 28th day of November, 1895, the said Sosman & Landis made and entered into a contract in writing with the said William J. McClain, the principal contractor with your petitioner, for the erection and construction of the aforesaid fire proof hotel and opera house building on the aforesaid premises ,wherein and whereby it was provided that the said Sosman & Landis should furnish and supply to the said William J. McClain certain described scenery, stage work, fixtures and properties to be used in and about the construction of said building, for the sum of $7,100, which said sum was to be paid in three installments as the work progressed and the materials were furnished, the whole work to be performed by the said Sosman & Landis and all the materials to be supplied by them, to be furnished on or before September 1st, 1895 (pp. 25 and 26 Printed Record). In accordance with the terms of said written contract so made as aforesaid between the said Sosman & Landis and the said William J. McClain, the said Sosman & Landis furnished all of the labor and material required by them to be furnished for their said contract, excepting to the amount of $600, and were paid by the said McClain the sum of $2,000, leaving, as claimed by the said Sosman & Landis the sum of $4,500 due them from the said McClain on their said contract with him.

On the 20th day of June, 1896, at 3:55 o'clock P. M., within four months after having furnished the last of said material and having performed said labor for the said McClain, the

said Sosman and Landis filed with the Recorder of Franklin County, Ohio, an affidavit containing an alleged itemized statement of the amount and value of said materials furnished and labor performed to and for the said McClain, with the credits thereon, together with a copy of their written contract with him for the performance of said labor and the furnishing of said material, alleging that said labor and material had been performed on and furnished for the construction of said hotel and opera house building, which affidavit is of record in Mechanic's Lien Book 9, pages 193 to 197, both inclusive, in the Recorder's office of Franklin County, Ohio, and in said affidavit claimed that the sum of $4,500, with interest from March 26, 1896, was due to them from the said William J. McClain.

VII.

Your petitioner further says that at the time of the making of the contract between your petitioner, and the said William J. McClain as principal contractor, for the construction and erection of said fire proof hotel and opera house building, and also at the time of the filing by the said Jones & Laughlins, Limited, and by the said Sosman & Landis, of their respective aforesaid affidavits to procure mechanic's liens on the aforesaid premises, hotel and opera house building, in the Recorder's office of Franklin County, Ohio, and at all intervening times between said dates the mechanic's lien law of Ohio was embodied in Section 3184 of the Revised Statutes of Ohio (91 Ohio Laws, p. 135), Section 3185, Revised Statutes of Ohio (Giauque, Bates, or Smith and Benedict's Edition), and Section 3185*a*, Revised Statutes of Ohio (91 Ohio Laws, 137), which said sections are as follows, to-wit:

"Sec. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas well, oil well, or any other well, or performs labor of any kind whatsoever, in altering, repairing or constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof or his agent, trustee, contractor, or sub-contractor, shall have a lien to secure the payment of the same upon such boat, vessel or other water craft, or upon such house, mill, manufactory or other buildings or appurtenance, fixture, bridge, or other structure, or upon such gas well, oil well or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material and machinery so furnished, and upon the interest, lease-hold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."

"Sec. 3185. Such person in order to obtain such line, shall, within four months from the time of performing such labor, or furnishing such machinery or material, file with the Recorder of the County where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery or material, and a description of any promissory note or notes given for such labor, machinery or material, or any part thereof, with all credits and off-sets thereon, a

copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder, and a description of the land on which the gas well, oil well, or other wells are situated, or the land on which the house, mill, manufactory, or other buildings, or appurtenance, fixture, bridge, or other structure may stand, or to which it may be removed; and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter."

"Sec. 3185*a*. In all cases where the labor, material or machinery referred to in Sections 3184 and 3185, shall be furnished by any person other than the original contractor, with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding sub-contractors,

material-men or laborers, fixed an unreasonably low price in the original contract for any work or materials for which a lien is given under section thirty-one hundred and eighty-four, the Court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such sub-contractors, material-men and laborers, shall have a lien to the amount of such fair and reasonable price so ascertained."

VIII.

Your petitioner further says that on or about the 11th day of August, 1896, the said William J. McClain made and filed in the Probate Court of Franklin County, Ohio, a deed of assignment in trust for the benefit of his creditors, to one, F. Burt Milligan, and is insolvent and unable to pay the claim of the said Jones & Laughlins, Limited.

Your petitioner further says that on December 8th, 1896, the Supreme Court of Ohio, in the cases of *Palmer and Crawford* vs. *Tingle*, and of *Young* vs. *The Lyon Hardware Company*, 55 O. S., 423, held the mechanic's lien law of Ohio as embodied in the foregoing sections Nos. 3184, 3185 and 3185*a*, Revised Statutes of Ohio, to be unconstitutional for the following reasons, and in the following respects, to-wit:

"1. The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the Bill of Rights of the Constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are necessary for the common welfare.

"2. Liberty to acquire property by contract, can be restrained by the General Assembly only so far as such restraint is for the common welfare and equal protec-

tion and benefit of the people, and such restraining statute must be of such a character that a Court may see that it is for such general welfare, protection and benefit. The judgment of the General Assembly in such cases is not conclusive.

"3. While a valid statute regulating contracts is, by its own force, read into, and made a part of such contracts, it is otherwise as to invalid statutes.

"4. The act of April 13th, 1894, 91 O. L., 135, in so far as it gives a lien on the property of the owner to sub-contractors, laborers, and those who furnish machinery, material or tile to the contractor, is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner."

IX.

On the 9th day of January, 1897, the said Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, filed their bill of complaint in the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, in the Sixth Judicial Circuit, against the said The Great Southern Fire Proof Hotel Company, the said Sosman & Landis, and others, to enforce its alleged mechanic's lien on the real estate of the said The Great Southern Fire Proof Hotel Company, alleging among other things, the execution of the aforesaid contract between them, the said Jones & Laughlins, Limited, and the said William J. McClain, the furnishing of structural steel to the said McClain for the construction and erection of said hotel and opera house building;

that the said McClain was indebted to them for a balance in the sum of $11,410.02, with interest from January 28th, 1896; that the said McClain was insolvent; that they had filed their affidavit with the Recorder of Franklin County, Ohio, on April 21st, 1896, at 4:50 o'clock P. M., containing, as claimed by them, an itemized statement of the amount and value of materials furnished by them to the said McClain, and that said materials had been used in the construction of the said hotel and opera house building on plaintiff's premises hereinbefore specifically described; that said affidavit was filed within four months after having furnished the said structural steel to the said McClain; that the materials so furnished by them was used in the construction of said hotel and opera house building, and constituted a part of said improvement, and that by reason of the premises they had a valid and subsisting lien on said hotel and opera house building from the 17th day of April, 1895 (the date when they first commenced to furnish said structural steel,) for the sum of eleven thousand four hundred and ten and .02–100 dollars ($11,410.02), with interest from January 28th, 1896, and prayed that their said alleged claim against the said William J. McClain be declared a valid and subsisting lien on the premises of The Great Southern Fire Proof Hotel Company, by virtue of said proceedings; that the liens on said property be marshaled—all the lien-holders therein having been made parties to said bill of complaint; that said premises be sold, and that their said claim be satisfied from the proceeds of said sale, and that they have all such other and further relief as may seem proper, and prayed that a writ of subpœna be directed to the said The Great Southern Fire Proof Hotel Company, and the other defendants therein, commanding

them to appear before said Court and there to answer all and singular the matters aforesaid, and to stand to, abide by and perform all such other further orders and decrees as to said Court should seem meet and proper. (Pages 1 to 12, printed record.) Said Sosman & Landis were made respondents in said complaint.

On the 9th day of January, 1897, there was issued out of the Clerk's office of said Court, a subpœna directed to the Marshal of said district and against the said The Great Southern Fire Proof Hotel Company, summoning it to be and appear in the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, in Columbus, on the first Monday of March following, to answer to said bill in chancery, and said Marshal, on the 18th day of January, 1897, returned said subpœna to the Clerk's office of the aforesaid Circuit Court reciting that he had served the same by handing a true copy thereof with all the indorsements thereon, to the Secretary, President and Vice President of the said The Great Southern Fire Proof Hotel Company, each personally (pages 12, 13, 15, 16, printed record).

Thereupon the solicitors of the said Hotel Company, on the first day of February, 1897, entered their appearance as such solicitors (page 17, printed record), and on the 24th day of February, 1897, in behalf of said Hotel Company, filed a demurrer to said bill of complaint for the reason and on the ground that the said Jones & Laughlins, Limited, had not in and by their said bill, made or stated such a cause as doth or ought to entitle them either to such recovery or relief as therein sought and prayed for from and against the said Hotel Company, and prayed the judgment of the said Circuit Court as to whether it should be compelled to make any answer to the said bill, or any of the matters and things

therein contained, and prayed to be hence dismissed with its reasonable costs therein sustained (pages 17 and 18, printed record).

The said cause was entitled and numbered in the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio in the Sixth Judicial Circuit, "Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, having their principal office and place of transacting business in the City of Pittsburgh, and State of Pennsylvania, Complainants, vs. The Great Southern Fire Proof Hotel Company, a corporation, et al., Respondents.

X.

On the 6th day of March, A. D. 1897, the said Sosman & Landis filed in said Circuit Court of the United States for the Southern District, Eastern Division, their answer and cross-bill alleging that the said Joseph S. Sosman and Perry Landis were partners doing business under the firm name and style of Sosman & Landis, having their principal office and place of business in the City of Chicago and State of Illinois, and, after admitting substantially all of the allegations of the petition, alleged that on the 28th day of February, 1895, they made and entered into a written contract with the defendant William J. McClain, being the one hereinbefore referred to, to furnish certain scenery, stage work, fixtures and property to be used by the said McClain in and about the construction of said hotel and opera house and to perform all labor necessary in and about the placing and construction of said material in said building, the same to be furnished for the sum of $7,100, and to be paid for in

three equal installments as the work progressed as hereinbefore recited, the whole of said work to be done by September 1st, 1895; that they, the said Sosman & Landis, in pursuance of their said contract with the said McClain, did between the 28th day of February, 1895, and the 26th day of March, 1896, furnish material and perform labor under their said contract to and for the said McClain of the value of $7,100, and did receive from the said McClain on said contract, the sum of $2,000 and from said hotel company the snm of $600, and that there remained due to them the sum of $4,500 on said eontract, with interest from the 26th day of March, 1896; that on the 20th day of June, 1896, at 3:55 o'clock P. M., they filed an affidavit containing an itemized statement of the amount and value of said materials furnished and labor performed under said contract between them and the said McClain, with all credits thereon, together with a copy of the said written contract between them and the said McClain, and that said material was furnished and said labor performed in and about the construction of said hotel and opera house, which said affidavit also contained a description of the premises on which said building was erected and is of record in the Recorder's office of Franklin County, Ohio, in the book and on the pages hereinbefore mentioned. Said affidavit further recited that there was due and unpaid to them the sum of $4,500, with interest from the 26th day of March, 1896, and that said Sosman & Landis filed said affidavit in compliance with Section 3184 of the Revised Statutes of Ohio as amended April 13, 1894, and Section 3185 of said Revised Statutes, and by reason of the premises the said Sosman & Landis claim a valid and subsisting lien on said hotel and opera house building and the premises hereinbefore described on which the same were

erected, from the date when said labor was first commenced and said material furnished, with interest from the 26th day of March, 1896.

The said Sosman & Landis in their answer and cross-bill prayed that the liens on said property be marshaled; that all lien-holders thereon be made parties; that said premises be sold and their claims satisfied from the proceeds of said sale, and for all such other and further relief as may be proper, and further prayed that a writ of subpœna be directed to The Great Southern Fire Proof Hotel Company, commanding it to appear before said Court to answer to all and singular the matters aforesaid, to stand to and abide by and perform all such other further orders and decrees as to said Court should seem meet and proper (printed record, pp. 19 to 25, both inclusive).

On the 12th day of April, 1897, the solicitors of the said Hotel Company, in behalf of it, filed a demurrer to said answer and cross-bill of the said Sosman & Landis, for the reason and on the ground that the said Sosman & Landis had not in and by their said answer and cross-bill, made or stated such a cause as doth or ought to entitle them to any such recovery or relief as therein sought and prayed for from or against this defendant, and for divers and other good causes of demurrer appearing on said cross-bill, and prayed the judgment of the Court, whether it should be compelled to make answer to said answer and cross-bill, or any of the matters and things therein contained and prayed to be dismissed with its reasonable costs in its behalf sustained (p. 38, printed record).

XI.

The said case was heard and determined by the said Circuit Court on said demurrer, and such proceedings were had in said case in said Circuit Court, that on the 3d day of May, 1897, the said Court rendered a judgment therein, as follows:

"This day came the parties and thereupon this cause came on to be heard on the demurrer of the defendant, The Great Southern Fire-Proof Hotel Company, filed to the bill of complaint, and also upon the demurrer of the said The Great Southern Fire-Proof Hotel Company to the cross-bill of complaint of the defendants, Sosman & Landis, and was argued by counsel and submitted to the Court.

"On consideration whereof, and being fully advised in the premises, the Court doth find that said demurrers, and each thereof, are well taken and doth allow and sustain said demurrers and each thereof.

"It is therefore ordered and decreed that said demurrers, and each thereof, be, and they hereby are, allowed and sustained.

"And thereupon, the said complainant, not desiring to amend its said bill of complaint, and the said defendants, Sosman & Landis, not desiring to amend their said cross-bill, it is ordered, adjudged, and decreed that said bill of complaint and said cross-bill be, and the same are each hereby, dismissed as to the defendant, The Great Southern Fire-Proof Hotel Company, with costs to the defendant, The Great Southern Fire-Proof Hotel Company, to be taxed.

"To all of which rulings, judgments, orders and decrees the said complainants and the said defendants, Sosman & Landis, except and ask that their exceptions

in that behalf be noted by the Court, and hereby, in open Court, give notice of and pray an appeal from each and all of said rulings, judgments, orders and decrees.

"The appeal is granted and the amount of the bond is therefor fixed at $250.00." (Page 39, printed record.)

XII.

The said case in the said Circuit Court of the United States was heard before, and decided by the Honorable GEORGE R. SAGE, District Judge of the United States Court for the District of Ohio, sitting in the said Court, and the opinion of the Court was delivered by him, and thereafter published in the 79 Fed. Rep. 477. (Page 31, printed record.)

XIII.

On the same day said judgment was so rendered by said Circuit Court declaring said mechanic's lien law unconstitutional, an appeal from said judgment to the United States Circuit Court of Appeals for the Sixth Circuit, was duly allowed (pages 39, 40, printed record) and on the 29th day of May, 1897, the petition of appeal of the said Jones and Laughlins, Limited (page 40, printed record) and of said Sosman and Landis (pages 41, 42, printed record) from said order and decree to the United States Circuit Court of Appeals for the Sixth Circuit, with their assignment of errors, (pages 41, 42, printed record) were filed in the clerk's office of said Circuit Court praying that their respective bills be allowed and a transcript of the record, proceedings and papers upon which said order was made and decree rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Sixth District, and on June 10, 1897, said appeals were allowed and bonds therefor allowed (pages 43,

44, printed record,) and bonds given and filed (pages 44, 45, 46, printed record,) and it was ordered by said Circuit Court that all proceedings in said case, be forthwith transmitted to the said United States Circuit Court of Appeals for the Sixth Circuit.

XIV.

On the 3d day of August, 1897, a certified transcript of the record of all proceedings of said Circuit Court in the said case was filed in the United States Circuit Court of Appeals for the Sixth Circuit, and the said case was entered and docketed in said Court of Appeals entitled, "*Benjamin F. Jones, et al*, Appellants, vs. *The Great Southern Fire Proof Hotel Company*, Appellee, No. 535," and through inadvertence and mistake the appeal by said Sosman and Landis was docketed in said Circuit Court of Appeals as a separate and distinct case and designated as "*Sosman and Landis*, Appellants, vs. *The Great Southern Fire Proof Hotel Company*, Appellee, No. 536."

The assignment of errors filed on behalf of the said Jones and Laughlins, Limited, was as follows:—

First. The Court erred in sustaining the demurrer of the defendant, The Great Southern Fire Proof Hotel Company, to the bill of complaint.

Second. The Court erred in rendering judgment in favor of the defendant, The Great Southern Fire Proof Hotel Company, and against these complainants.

Third. Judgment should have been rendered in favor of these complainants and against said defendants.

Fourth. The Court erred in holding the Sections of the Mechanic's Lien Law of Ohio, under which complainants seek to enforce the lien set out in their bill, to be unconstitutional, (page 41, printed record.)

The assignment of errors filed in behalf of Sosman and Landis was as follows:—

First. The Court erred in sustaining the demurrer of the defendant, The Great Southern Fire Proof Hotel Company, to the cross-bill of complaint filed by these defendants, Sosman and Landis.

Second. The Court erred in rendering judgment in favor of the defendant, The Great Southern Fire Proof Hotel Company, and against these defendants, Sosman and Landis.

Third. Judgment should have been rendered in favor of these defendants, Sosman and Landis, and against said defendant, The Great Southern Fire Proof Hotel Company.

Fourth. The Court erred in holding the Sections of the Mechanic's Lien Law of Ohio, under which these defendants sought to enforce the lien set out in their cross-bill, to be unconstitutional. (Pages 42 and 43, printed record.)

XV.

The case came on to be heard on the appeal of said Benjamin F. Jones *et al.*, in the said Circuit Court of Appeals, on the 15th day of December, 1897, before the Honorable WILLIAM H. TAFT, HORACE H. LUPTON and ——— CLARK, and on the 16th day of April, 1898, the said Court rendered a judgment reversing the said judgment of the said Circuit Court therein, the judgment of said Circuit Court of Appeals being as follows:

> "This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Ohio, and was argued by counsel.
>
> "On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of

the said Circuit Court in this cause be, and the same is hereby reversed with costs, and the cause is remanded to the Court whence it came, with directions to overrule the demurrer and require the defendants to answer."

The case came on to be heard on the appeal of said Sosman & Landis in said Circuit Court of Appeals, on the 15th day of December, 1897, before the Honorable WILLIAM H. TAFT, HORACE H. LUPTON and ——— CLARK, and on the 16th day of April, 1898, the said Court rendered a judgment reversing the said judgment of the Circuit Court therein, the judgment of said Circuit Court being as follows:

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Ohio, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed with costs, and the cause is remanded to the Court whence it came, with directions to overrule the demurrer and require the defendant to answer."

XVI.

A certified copy of the entire record of the said case in the said Circuit Court of Appeals is furnished and filed herewith, in conformity with Rule 37 of this Honorable Court, relative to cases from Circuit Court of Appeals.

XVII.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in the said case is erroneous, and that this Honorable Court

should require the said case to be certified to for its review and determination under and in conformity with the provisions of the Sixth Section of the Act of Congress entitled, "An Act to establish Circuit Court of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said Act.

The judgment of said Circuit Court of Appeals is erroneous in that said mechanic's lien law was held to be constitutional and said judgment was rendered in favor of the said Jones & Laughlins, Limited, whereas said law should have been held unconstitutional and said judgment should have been rendered in favor of your petitioner, for the following reasons, and on the following grounds, to-wit:

(*a*) The said mechanic's lien law of Ohio is unconstitutional in that it denies to the owner of real estate the right of acquiring, possessing and protecting property, and the right of contract, in relation thereto, of making and enforcing contracts, of fixing and limiting the consideration therefor, and the manner and time of payment, and is not for the equal protection and benefit of the people, and therefore contravenes Sections 1 and 2 of the Bill of Rights (Art. 1, Constitution of Ohio), which sections are as follows:

> "Sec. 1. All men are, by nature, free and independent and have certain alienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.
>
> "Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit," etc.

(*b.*) It impairs the obligations of contracts and is in conflict with that part of Sec. 28, Art. 2, of the Constitution of Ohio, which provides that "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts"; and also with Sec. 10, Art. 1, Constitution of the United States, which contains a similar provision.

(*c.*) It deprives the real estate owner of his property without due process of law, and of the equal protection of the laws, abridges the privilege of citizens of the United States as regards the right of contract, and is therefore unconstitutional, and in conflict with Sec. 1, Art. XIV., of the Constitution of the United States, which recites: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(*d.*) The Circuit Court of Appeals should have followed the decision of the Supreme Court of Ohio, holding said law unconstitutional, because there was not presented to said Circuit Court any question as to negotiable paper, municipal bonds, general commercial law, or general jurisprudence, or any matter of interstate transportation and commerce, or any question other than the constitutionality of a law of the State of Ohio having no extra-territorial effect.

(*e.*) The said Circuit Court of Appeals should have followed the decision of the Supreme Court of Ohio holding said law unconstitutional, for the reason that the Supreme Court of Ohio has at all times recognized and enforced the doctrine that the rights of material-men and sub-contractors are limited and defined by and dependent upon the contract

between the owner and the original contractor, and are to be worked out through it (*Copeland* vs. *Manton*, 22 O. S., 398; *Dunn* vs. *Rankin*, 27 O. S., 132; *Palmer & Crawford* vs. *Tingle*, 9 O. C. C., 708; *Stark* vs. *Slemmons*, 54 O. S., 435; *Palmer & Crawford* vs. *Tingle*, and *Young* vs. *Lyon Hardware Co.*, 55 O. S., 423; *Hampson* vs. *The State*, 9 O., 318, 319), which construction of the mechanic's lien law of Ohio obtained at the time the said Jones & Laughlins, Limited, and said Sosman & Landis contracted with McClain, and at the time the said McClain contracted with your petitioner, nor has there at any time been a change made by the Supreme Court of Ohio in judicial construction as to the mechanic's lien law, or laws of said State; and during the time within which the said Jones & Laughlins, Limited, and said Sosman & Landis, were furnishing labor and material to the said William J. McClain, to be used in said hotel and opera house building; the said case of *Palmer & Crawford* vs. *Tingle*, and *Young* vs. *The Lyon Hardware Company*, in which the constitutionality of the said mechanic's lien law was called in question, was pending in the Courts of Ohio, and the decision rendered therein by the Circuit Court of Putnam County, Ohio (9 O. C. C., 708), was made at the November term of said Court in 1895, and the said Jones & Laughlins, Limited, and said Sosman & Landis, were apprised of the fact that the constitutionality of said law was questioned. The decision of the said Circuit Court of Appeals is in conflict with the decision of the Supreme Court of Ohio, and the doctrine relating to the mechanic's lien law which had uniformly been recognized by said Supreme Court in said State.

The importance and gravity of the questions raised and presented by the petitioner's demurrer to the bill and the

aforesaid answer and cross-bill will be recognized when it is stated that under the provisions of said mechanic's lien law a lien is given to the material-men and sub-contractor without notice to the owner, at any time within four months from the completion of the improvement on the owner's real estate or the furnishing of labor or material, and in any amount not in excess of the original contract price between the owner and such principal contractor, regardless of the state of the account between the owner and such principal contractor, and thus the owner may be compelled to pay for his improvement in whole or in part a second time, and to a person with whom he sustains no contractual relations, although the owner may have acted in strict compliance with his contract, paid in advance, or as his improvement progressed; that such law has no application to any or all kinds of contracts but is limited in its operation to a special class of contracts, viz.: To persons who labor or furnish materials for the objects named in the act and thus discriminates in favor of a special class of citizens to the exclusion of all others; that such law places upon the owner of real estate a burden that is not borne by the owner of any other class of property; that such law denies to the owner of real estate, the right to enjoy and possess property and contract in relation thereto as he may deem best; that such law denies to the owner of real estate the right to contract with reference to his property other than upon a monied consideration, and deprives him of the right of fixing the amount, or medium of payment for improvements made on his property, in that he may be compelled to pay a second time, as aforesaid, and may be compelled to pay in money, although he may have contracted to pay in some other commodity; that such law makes the owner of real estate, by force of legislation secur-

ity for the original contractor that such original contractor will perform his contract and thus defeats the owner in the enjoyment of his property; that such law divests the owner of his title without any act, tort or default on his part, and thus deprives him of the equal protection of the laws and of his property without due process of law; that such law tends to drive small and insolvent contractors out of business, and leaves the contract business in the hands of those who are rich enough to guarantee their contracts; that such law compels the owner of property to pay any claim or claims up to the full extent of twice the contract price, and gives him no recourse except an action by damages against the original contractor.

XVIII.

Your petitioner is advised and believes that the judgment so rendered by the Circuit Court of Appeals is not in harmony with the decision announced by this Honorable Court in *Gulf, Colorado & Sante Fe R. R. Co.* v. *Ellis*, 165 U. S., 150, in that said mechanic's lien law deprives owners of their property without due process of law, and of the equal protection of the law, and makes a classification that is not based on any reasonable ground and makes a mere arbitrary selection of one class of citizens to the exclusion of all others.

This Honorable Court, in the decision announced in *Gulf, Colorado & Sante Fe R. R. Co.* vs. *Ellis*, promulgated the same doctrine as is announced in *Coal Co.* vs. *Rosser*, 53 O. S., 12, *State* vs. *Ferris*, 53 O. S., 314, and *Young* vs. *The Lyon Hardware Company*, 55 O. S., 423, and relied largely on the same authorities as were cited by the Supreme Court of Ohio to sustain its decision in said cases of *Coal Co.* vs. *Rosser*, and *Young* vs. *The Lyon Hardware Co.*

XIX.

Your petitioner thus respectfully submits that the questions upon the legal and just construction and effect of the said mechanic's lien law of Ohio, involved in and presented by the said demurrer and case of your petitioner, should be authoritatively and finally adjudged by this Honorable Court, upon and after a full presentation to the Court of the merits of said questions on the part of the petitioner and the said Jones & Laughlins, Limited, and further represent that this petition is not interposed for delay.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court on a day to be therein designated, a full and complete transcript of the record and of all proceedings of said Circuit Court of Appeals in said case therein, entitled, Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, having their principal office and place of transacting business in the City of Pittsburg, in the State of Pennsylvania, Appellants, vs. The Great Southern Fire Proof Hotel Company, Appellee, Number 535; and the case therein entitled *Sosman & Landis, Appellants* vs. *The Great Southern Fire Proof Hotel Co., Appellee*, No. 536, and incorrectly docketed as a separate suit as aforesaid; that said cases may be reviewed and determined by this Court as provided in section six of an Act of Congress, entitled, "An Act to establish Circuit Court of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of

the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper, and in conformity with the said act, and that the said judgment of the Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court. And your petitioner will ever pray, &c.

J. E. SATER AND
D. F. PUGH,
J. C. Richards
Attorneys and Counselors for Petitioner.

State of Ohio, Franklin County, ss.:

J. E. Sater, being first duly sworn, says that he is one of the attorneys, and of counsel for The Great Southern Fire-Proof Hotel Company, the petitioner above named, and as such had personal charge for it of the case in the foregoing petition mentioned, in the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, and in the United States Circuit Court of Appeals for the Sixth Circuit, and that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

J. E. SATER.

Sworn to before me and subscribed in my presence this 24th day of January, A. D., 1899.

[SEAL.] L. F. SATER,
Notary Public in and for Franklin County, Ohio.

SUPREME COURT OF THE UNITED STATES.

The Great Southern Fire-Proof Hotel Company, *Petitioner*,

vs.

Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, and others, *Respondents*.

MOTION FOR AN ORDER THAT A WRIT OF CERTIORARI ISSUE.

The Great Southern Fire-Proof Hotel Company, the petitioner, in its petition herein, moves the Court for an order that this Court issue a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, directing that Court to certify to this Court a copy of the record of this cause in that Court, wherein said Jones & Laughlins, Limited, and others, are appellants, and the said The Great Southern Fire-Proof Hotel Company is appellee, which case is known on the dockets of said Court as Case No. 535 and 536.

J. E. SATER AND
D. F. PUGH,
Attorneys for Petitioner.

No. 210
Brief of Petitioner.
FILED
FEB 17 1899
JAMES H. MCKENNEY,
Clerk

Supreme Court of the United States

Filed Feb. 17, 1899.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, *Petitioner*,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLINS, HARRY A. LAUGHLINS, Jr., BENJAMIN F. JONES, Jr., DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JONES & LAUGHLINS, LIMITED, AND OTHERS, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE PETITIONER.

D. F. PUGH AND
J. E. SATER,
Attorneys for Petitioners.

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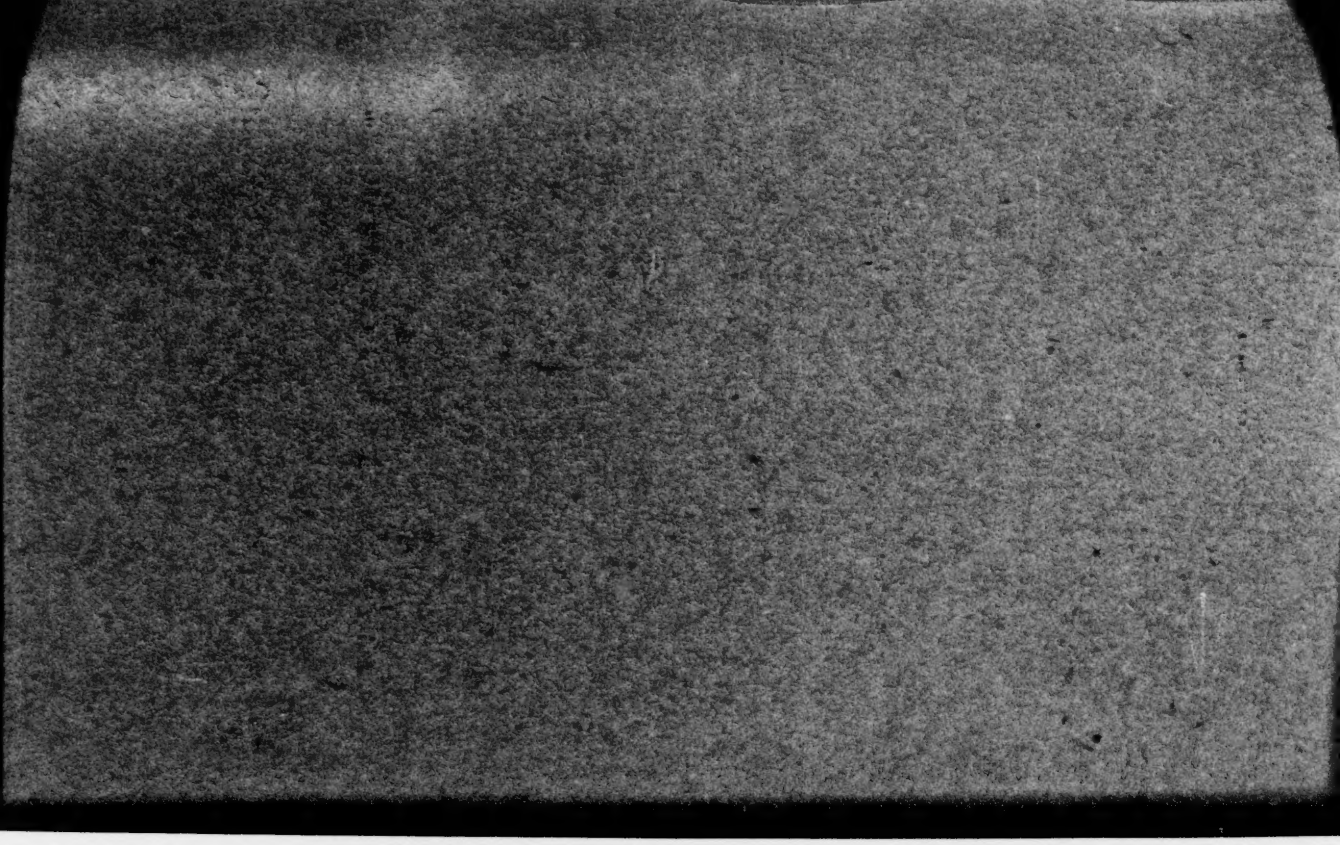

Supreme Court of the United States

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, *Petitioner*,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLINS, HARRY A. LAUGHLINS, JR., BENJAMIN F. JONES, JR., DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JONES & LAUGHLINS, LIMITED, AND OTHERS, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE PETITIONER.

The petitioner's prayer is for a writ of *certiorari* to the United States Court of Appeals for the Sixth Circuit.

Its petition is filed in pursuance of Section 6 of the Judiciary Act of March 3d, 1891.

By its petition, the petitioner also asks this Court to review and reverse an interlocutory order or decree of the Circuit Court of Appeals of the Sixth Circuit.

A certified copy of the record, including therein all the proceedings in the United States Court of Appeals of the Sixth Circuit in this case, accompanies the petition.

The only question, or questions, which counsel for the petitioner conceive can arise now, at this stage of the case, are: Is the petition for the writ of *certiorari* premature? Does the case present a question of "peculiar gravity," or of "general importance," or of "uniformity of decision?"

This Court has, in several cases, decided when, and for what reason, it may issue a writ of *certiorari*.

(1) It may be done in a case which is pending in the said Court of Appeals.

(2) The case must belong to those classes of cases in which the decision of the Court of Appeals is declared a finality.

(3) It must be a case in which a question of "peculiar gravity," or of "general importance," or of "uniformity of decision" is involved.

In the case of *Forsyth* v. *City of Hammond*, 166 U. S., 506, 514, is the last statement of the rule announced by this Court. The opinion declares: "We reaffirm in this case the propositions heretofore announced, to-wit: that the power of this Court in *certiorari* extends to every case pending in the Circuit Court of Appeals, and may be exercised at any time during such pendency, provided, the case is one which, but for this provision of the statute, would be finally determined in that Court. And, further, that while this power is co-extensive, with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, *and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding a conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a State,* * * * *demands such exercise.*"

Again, in *American Construction Company* v. *Jacksonville, I. & K. W. R'y Co.*, 148 U. S., 372, 383, the resolution of this Court was, that the power to issue the writ of *certiorari* would be exercised "only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

In *Cunard Steamship Co.* v. *Fabre*, 13 Sup. Ct. Rep., 1045, the writ was issued because one of the three Circuit Judges composing the Court of Appeals, dissented from the decree which reversed a decree of the District Judge.

In *Forsyth* v. *Hammond*, before cited, the controversy in the State Court was about the annexation of a few hundred acres of land to the city of Hammond, Indiana. The lower Court of that State, upon the verdict of a jury, decreed that the land should be annexed to the city of Hammond. Part of the land thus annexed belonged to Mrs. Forsyth. The city levied taxes to the amount of $3,500.00 on her land. She filed a bill in equity in the Circuit Court of the United States for the District of Indiana, praying for an injunction restraining the collection of the taxes. That Court refused to award the injunction and dismissed her bill. She appealed to the United States Circuit Court of Appeals. That Court reversed the decision of the Circuit Court and remanded the case to that Court for further proceedings.

Before Mrs. Forsyth filed her bill in the United States Court she, and the owners of the rest of the annexed land, appealed from the judgment of the lower State Court to the Supreme Court of Indiana. That Court affirmed the decision of the lower Court, and this Court's decision was rendered before the decisions of either of the United States Courts was announced.

In both of these cases, in the one prosecuted in the United States, and in the one prosecuted in the State Courts, the sole issue was as to the validity of the annexation proceedings. The decision of the State Courts and of the United States Circuit Court was that the proceedings were valid; the decision in the United States Court of Appeals was that they were invalid. There was a categorical contradiction between the decisions of the United States Circuit Court and the Supreme Court of Indiana, on the one side, and the decision of the United State Circuit Court of Appeals on the other side.

The pertinency of a quotation from the opinion in *Forsyth* v. *Hammond*, *supra*, page 515, disclosing the reasons for issuing the writ of *certiorari*, is obvious. Justice BREWER said:

> "Among the considerations thus suggested are those which indicate why, in this case, the Court properly exercised its power and issued the writ of *certiorari*. There was a conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit, and the Supreme Court of Indiana. The latter Court had declared that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal, and therefore that that territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States Circuit Court of Appeals, by its decision in this case had declared that such annexation proceedings were invalid, and that the property of this petitioner was not within the city limits. * * * All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for *certiorari* was made, and, although no final decree had

been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment."

The parallel between this case, and the case at bar is perfect. There is no distinction whatever between the relevant master facts of the two cases.

In the case at bar the decision of the Supreme Court of Ohio was that the mechanic's lien law referred to in the petitioner's petition was unconstitutional; and the decision of the United States Circuit Court was exactly in accord with that decision. The decision of the United States Circuit Court of Appeals was in positive conflict with those decisions. The decision of the Supreme Court of the State was rendered before the decisions of either of the United States Courts was rendered.

The only distinction between the two cases is, that in the case at bar the plaintiffs and the cross-petitioner were not parties to the case in which the Supreme Court of the State pronounced the mechanic's lien law unconstitutional. But that distinction does not affect the parallel between them on principle and reason.

It is respectfully submitted, borrowing from the opinion of Justice BREWER, that the "unfortunate possibilities of conflict and collision which might arise from these adverse decisions," are enough to entitle this petitioner to have the case removed to this Court for examination, and are a sufficient reason why this Court should issue a writ of *certiorari* in this case.

It will probably be claimed that the matter involved in these suits is exclusively one of private interest. But that is not the true interpretation of these cases. The fact that

there is a conflict between the decision of the Supreme Court of the State of Ohio, and the decision of the United States Circuit Court, on the one side, and the decision of the Circuit Court of Appeals, on the other side, renders the matter involved one of public interest. The fact that there are only these two cases now pending in which this collision of decisions has occurred, does not prove that there may not be other cases in which the same conflict may arise. It is possible that there yet may be other cases. This Court has a right, probably it is its duty, to consider this possibility.

The conflict which exists between these decisions, as shown by the record, makes the question involved one of gravity and importance—just such a question as has heretofore persuaded, and ought now to persuade, this Court to issue a writ of *certiorari*.

In *Forsyth* v. *The City of Hammond*, which we have cited, there was just as much reason for the contention that the matter involved was only of private interest, as there is in these cases. The Court said that by the decision of the Circuit Court of Appeals there "would be a tract of a few hundred acres of land within the exterior boundaries of the city of Hammond * * * withdrawn from the city's jurisdiction, and in fact excepted from its territorial limits." On the other hand, the Court said, the Supreme Court of Indiana had declared that this tract of land *was* within the city's jurisdiction and territorial limits. Now, nobody was interested in this matter except the owner of the tract of land, on the one side, and the city of Hammond, a municipal corporation, on the other side.

The controversy did not involve the whole State of Indiana; it did not involve the whole population of the State

of Indiana. It did not even interest the whole population of one county.

We again insist that the necessity of avoiding a conflict between the Circuit Court of Appeals and the Supreme Court of the State, is a matter of public interest, and not of private interest; and that this is an answer to any criticism that may be made that these cases only involve a matter of private interest.

We assume that a discussion of the merits of the controversy in the case and of the decision of the Circuit Court of Appeals would not be relevant to the brief on this application for a writ of *certiorari*, and although the opinions of the Circuit Court and Circuit Court of Appeals are contained in the record, we have refrained from a discussion of these matters.

Respectfully submitted,

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No. 210.

Brief of Pugh for Petitioner.

No. 17,884.

Office Supreme Court U. S.
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Supreme Court of the United States.

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OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, *Petitioner*,

vs.

BENJAMIN F. JONES ET AL., AND SOSMAN AND LANDIS.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Sixth Circuit.

Argument in behalf of The Great Southern Fire-Proof Hotel Company.

J. E. SATER, AND
D. F. PUGH,
Attorneys for Petitioner.

COLUMBUS:
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No. 17,296.

Supreme Court of the United States.

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Argument in behalf of The Great Southern Fire-Proof Hotel Company.

STATEMENT.

The question presented to the Court in this cause is the constitutionality of the Mechanics' Lien Law of Ohio, passed on April 13, 1894. The law is found in Vol. 91, Ohio Laws, pages 135, 137, or in sections 3184, 3185 and 3185*a* of the Revised Statutes of Ohio, Gianque's, Bates', or Smith and Benedict's Edition. The Supreme Court of Ohio and the Circuit Court, Southern District of Ohio, Eastern Division, both held the law unconstitutional. The Circuit Court of Appeals, Sixth Circuit, held to the contrary. There is thus not only a conflict of opinion between the State and the Federal Courts, but the Federal Courts themselves are not in harmony.

Conflict of opinion.

or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material and machinery so furnished, and upon the interest, lease-hold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."

"Sec. 3185. Such person in order to obtain such lien, shall, within four months of the time from performing such labor, or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material, and a description of any promissory note or notes given for such labor, machinery, or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder, and a description of the land on which the gas well, oil well, or other wells are situated, or the land on which the house, mill, manufactory, or other buildings, or appurtenance, fixture, bridge, or other structure may stand, or to which it may be removed; and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter."

"Sec. 3185*a*. In all cases where the labor, material or machinery referred to in sections 3184 and 3185, shall be furnished by any person other than the original contractor, with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between

> the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, material-men or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section thirty-one hundred and eighty-four, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such subcontractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

The law seeks to give a direct and independent, and not a derivative, lien in favor of the subcontractor, laborer and material-man on the owner's property. The filing of an affidavit with the recorder of the county, if the law be valid, gives an absolute lien in favor of the claimant, up to the full amount of the owner's original contract price, regardless of the state of accounts between him and his original contractor. Thus the owner may contract for a given price but may be compelled to pay twice as much, and to persons with whom he has no privity of contract and who are to him strangers.

The law direct and derivative

As hereinafter fully shown in a history of the mechanics' lien law of Ohio, the Courts of that State, and until 1894, the legislature also, uniformly refused to recognize other than a derivative lien. It has been and is still the settled rule in Ohio, that the subcontractor's rights are limited and measured by the terms of the contract between the property owner and original contractor.

THE ERRORS ASSIGNED.

In behalf of the Hotel Company we claim that the Circuit Court of Appeals erred in holding the mechanics' lien law constitutional, for the following reasons:

1. It contravenes sections 1 and 2 of the Bill of Rights (Art. 1, Constitution of Ohio), which sections are as follows:

"Sec. 1. All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.

"Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit," etc.

2. It is in conflict with that part of Sec. 28, Art. 2, of the Constitution of Ohio, which provides that "The General Assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts;" also with Sec. 10, Art. I, Constitution of the United States, which contains a similar provision.

3. It is in conflict with Sec. 1, Art. XIV, of the Constitution of the United States, which recites: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The law having been declared unconstitutional by the Supreme Court of Ohio, the decision of that Court is controlling and should have been followed by the Circuit Court of Appeals.

Our contention is that,

(*a*) The above mentioned mechanics' lien law denies to the owner of real estate the right of acquiring, possessing and protecting property, and the right of contract in relation thereto—of making and enforcing contracts, of fixing and limiting the consideration therefor, and the manner and time of payment.

(*b*) It impairs the obligation of contracts.

(*c*) It deprives the owner of his property without due process of law.

(*d*) It is obnoxious class legislation.

(*e*) The decision of the Supreme Court of Ohio is controlling.

ARGUMENT.

HISTORY OF THE MECHANICS' LIEN LAW OF OHIO.

The law of 1894 was a radical departure from former mechanics' lien laws of Ohio, and from the settled doctrine of the Ohio Courts. The first general mechanics' lien law enacted by the legislature of Ohio was passed on March 11th, 1843 (41 O. L., 66). It embodied every essential feature of the mechanics' lien law of the State up to the passage of the act of 1894. It gave a lien to principal contractors and also to subcontractors. The subcontractor, laborer or material-man, to secure a lien, was required to file with the owner an attested account of the amount and value of the work and labor performed or materials furnished for which payment had not been made. On receipt of this notice the owner was required to retain subsequent payments due [the principal contractor for the benefit of the person or persons filing such attested accounts. The owner was then required to serve a copy of such attested account on the principal contractor, and if such contractor did not within ten days after receipt of a copy of such attested account give notice of his intention to dispute the claim, or arbitrate or adjust it with the subcontractor, or if for ten days after giving such notice he should neglect or refuse to adjust or arbitrate the same, he was considered as assenting to the demand of the subcontractor, laborer or material-man, and the owner was required to pay the same. Every person entitled to a lien was also required to file an account with the recorder of the county in which the improvement was made, showing the items of labor, skill, material and machinery furnished, which account was to be recorded in a book kept for that purpose. The lien being thus acquired continued for two years and was enforcible by

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appropriate legal proceedings. The principal contractor desiring a lien was also required by section two of the act, to file his attested account with the owner, and also with the county recorder (Sec. 7). The significant provisions of the law are two: *First*, the law provided for *notice* to the owner in all cases and notice to both owner and principal contractor in case subcontractors, laborers, or material-men sought to acquire liens; *second*, the subcontractor, laborer or material-man *stood in the shoes of the principal contractor and were subrogated to his rights.* The owner was bound by his contract with the original contractor and that contract measured the rights of all persons dealing with the original contractor.

The law of 1843, outside of some minor amendments, (Curwen's Statutes, 1520, 2201), remained in all its features until May 1st, 1871 (68 O. L., p. 107). The second section was then amended and enlarged and the protection afforded mechanics, laborers, contractors and material-men was somewhat increased, but the subrogation of all persons contracting with the original contractor to his rights and the manner of notice to the owner and all interested parties were preserved intact. Although several subsequent amendments were made, these predominant features remained unaltered until the enactment of the law of 1894, which sought to dispense with the matter of notice and to make the owner's property liable to any and all subcontractors, regardless of the account between the owner and the original contractor. Under the early legislation of Ohio, the lien acquired by a subcontractor was on the funds in the owner's hands and not on the building, but subsequent legislation provided a method whereby he might acquire a lien on the building or improvement, but only to the extent of undisbursed funds in the owner's possession at the date of notice and filing of the attested account with the county recorder. A partial historical summary of mechanics' lien legislation in Ohio, is

given by Judge GRANGER in his dissenting opinion in *Smith Bridge Company* v. *Bowman*, 41 O. S., 37. See also Rockel & White, Ohio Lien Law, pp. 47, 50.

Judge BURKETT, in *Standard Oil Company* v. *Sowden, Assignee*, 55 O. S., 341, in speaking of the mechanics' lien law, says:

> "The mechanics' lien law has been amended from time to time and each amendment evinces a purpose on the part of the general assembly to more effectually secure the mechanics, laborers, and furnishers of materials in the collection of moneys earned by them. The object of the statute is to tie up the money owed by the owner of the structure and make it security for the indebtedness to the mechanics, laborers and furnishers, and those holding under them, their rights to the fund to be determined by the ordinary rules of law and equity."

Aside from the legislative intent as embodied in the Statute, the Courts of Ohio by an unbroken line of decisions, have held that the rights of subcontractors are circumscribed by those of the original contractors.

In construing the act of 1843 (Swan & Critchfield's Stat., 833), in the case of *Copeland* v. *Manton*, 22 O. S., 398, 403, 404, it was said:

> "It seems to be the policy of the act to confer upon the subcontractor only the right to be subrogated to the claims of the contractor, under his contract with the owner, at the time the requisite notice is given. If, therefore, the contractor has *then* no claim against the owner, or there are no more payments due or to be made to *him*, the act does not in terms or effect bind the owner to retain anything for the benefit of the subcontractor, and he obtains no lien on the amount the owner is bound in law and equity to pay to another.
>
> "The position of the subcontractors in this respect is much the same as if they had garnished the owner by proceeding in attachment. Both forms of proceeding are statutory remedies to subject a claim due to a debtor to the payment of his debt, and whenever available, are, in effect, substantially alike. It is a funda-

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mental principle that an attaching creditor can stand on no better footing, as against *bona fide* purchasers or assignees of his debtor, than the latter does at the time of the attachment or garnishment."

So in the case of *Dunn* v. *Rankin*, 27 O. S., 132, the Supreme Court of Ohio said:

"Under the statute to create a lien in favor of mechanics and others, the claim of a subcontractor against the owner of the structure is limited to the work and materials furnished in performing a particular contract between the owner and contractor in relation to such structure; also to the amount unpaid on such contract at the time he delivers to the owner his attested account against the contractor for such work and materials.

"Where independent jobs are let under separate contracts, though between the same owner and contractor, the liens of the subcontractors are respectively confined to the amount unpaid on the particular contract each one aided the contractor to perform."

In *Bullock* v. *Horn*, 44 O. S., 420, 424, SPEAR, J., in passing on the rights of sub-contractors arising under the mechanic's lien law of Ohio, said:

"In giving a construction to this statute, by fair inference it may be assumed that the rights of the workman and material-man, as against the owner, are based upon the latter's contract with the contractor, and and while they are subordinate to the contract, and are to be worked out through it, those parties have the right to rest in security upon it and the means provided by law to secure its application to their demands. In the absence of fraud they are presumed to have notice of the terms of the original contract. Hence, if the original contract showed that payment had been made in advance to the contractor, or if it contemplated the allowance, by the contractor, of set-off then held or to be acquired by the owner as payment, such provisions would bind the workmen and material-men, as they would be held to have accepted employment of the contractor with an implied assent to such terms."

To the same effect is Rockel and White—the only Ohio text writers on the lien law of the State—pp. 112, 113, 114.

The Supreme Court of Ohio, when called upon to determine the validity of the act of 1894, in the case of *Young* v. *The Lyon Hardware Co.*, 54 O. S., 423, refused to depart from the settled and uniform doctrine, and held:

> "The act of April 13, 1894, 91 O. L., 135, in so far as it gives a lien on the property of the owner to subcontractors, laborers, and those who furnish machinery, material, or tile to the contractor is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner."

The same principle is announced in *Stark* v. *Simmons*, 54 O. S., 435, and in *Mack* v. *DeGraff and Roberts' Quarries*, 57 O. S., 463.

No clearer statement of the fundamental principle underlying the Ohio doctrine can be found than in the early case of *Hampson et al.* v. *The State*, 8 O., 321, 322, decided in 1838, and hereafter quoted.

The foregoing as evidenced by the statutes and an unbroken line of decisions was the construction placed on the mechanic's lien law of Ohio when Jones and Laughlins and Sosman and Landis contracted with McClain, the original contractor with The Great Southern Fire Proof Hotel Company, and they and each of them were bound by the law as thus fixed and determined.

As the question is a new one in the Federal Courts, it is their duty to give weight to the decisions of the Courts of the State, whose law they administer.

> *Farmer's Nat. Bank* v. *Sutton Manfg. Co.*, 6 U. S. App., 312; 52 Fed. Rep., 191.

The case is one of those in which "for the sake of harmony and to avoid confusion, the Courts of the United States will lean towards an agreement of views with the State Courts, if the question seems to them balanced with doubt."

Burgess v. *Seligman*, 107 U. S., 20.

THE OHIO DOCTRINE FOUNDED ON REASON AND SUSTAINED BY OTHER COURTS.

> "A sub-contract, as its very name indicates, is subordinate to the original contract. A sub-contractor's lien therefore depends on the original contract, and is, like the lien of the contractor himself, governed by its terms."
>
> Boisot on Mechanic's Liens, Sec. 228.

The laborer, subcontractor or material-man can know and must take notice of every term of the agreement under which the original contractor is proceeding to build. He is charged with notice of the general character of the building, what price is to be paid for it, the manner and time of payment, and of the labor and materials proper to be used in its construction. He must see that the materials he supplies are furnished at the proper time, and are such as are required both as to quantity and quality. He is bound to know whether or not the original contractor has stipulated that the building shall be delivered free from liens. If such provision be embodied in the contract with the owner, neither the original contractor nor his subcontractors, laborers or material-men, can acquire a lien on the premises. He is bound to know whether the original contractor has agreed to look for payment to the personal responsibility of the owner, or to both the owner's personal responsibility and the premises; whether he has agreed to accept payment in lands, or chattels, or money; whether the building is to be brick, or wood, or marble, or to be roofed with slate, tin or shingles. If the contract stipulates that the building shall be constructed for one thousand dollars, or any other specified sum, he cannot compel the owner to pay a larger sum unless there be extras.

It is a familiar doctrine that the subcontractor is bound by the plans and specifications embodied in and made a part of

the original contract between the owner and the original builder; he must observe them in their minutest details as must the original builder. Should he depart in any manner from the designs, the dimensions, materials, plans, shapes, and sizes, as expressed in the original contract, he does so at his own peril. He is merely the representative of the original contractor—his agent—with no powers and no rights not belonging to such original contractor. He undertakes to perform the contract of the latter with the owner, either in whole or in part. He is not permitted to say that he does not know the particulars of such contract. It is a legal necessity arising from the fact that he has undertaken to do the work which his principal has engaged to do. Having assumed to perform his principal's contract with the owner, he must perform it according to its express limitations, and for the amount therein named. He cannot have the benefit of the builder's contract without accepting its burdens, or without accepting the conditions on which those benefits are conferred. Were it otherwise, he would defeat the explicit contract of the owner upon a point without which the owner probably would never have consented to it. If the law were to tolerate this method of dealing with building contracts, the original contractor might sub-let his contract by portions to different persons, and a contract might be enforced against the owner to which he never consented, and such is the necessary consequence of the act of 1894.

It is no hardship to enforce against laborers, material-men and subcontractors, the provisions of the original contract with all its limitations. Otherwise the owner has no means of protecting himself, because he cannot know to whom the contract or portions thereof may be sub-let. The subcontractor may, if the price and other terms of the contract do not suit him, refrain from contracting. No good reason exists for giving the extraordinary privilege to subcontractors

of repudiating one of the most important terms of a contract —that relating to the price of the building—or of taking from the owner the right to insist on the performance of his contract according to its very terms.

Brown v. *Cowen*, 110 Pa. St., 588, reviewed a lower Court which had held that it made no difference what the contract was between the owner and principal contractor: that the material-man and subcontractor having been led by the original contractor to furnish the lumber on the credit of the building, had a right to a lien.

The Supreme Court of Pennsylvania, however, in the Brown case, held that a contractor can only bind the building by virtue of the peculiar statutory relation he bears to the owner under the contract; *that the instruction of the Court below was palpably erroneous: that the owner of a building could thus be entrapped into the payment of a debt which he never contracted, and which was not contracted by any one having any legal authority to bind him or his estate, is so monstrous that the mere statement of the proposition is sufficient argument to refute it. It is the plain obvious duty of one who deals with an alleged contractor to know the relation which he bears to the owner; failing in this he furnished lumber and material at his peril.*

The provision of a contract fixing the price of a building is as sacred as any other portion of it.

In *Taylor* v. *Murphy*, 148 Pa. St., 337. 33 Am. St., 825–827, the Supreme Court of Pennsylvania held, that if a statute should authorize the entry of a lien for work or material in violation of the terms of a contract waiving a right to a lien, and stipulating that the building should be delivered free therefrom, it would be in contravention of that section of the Constitution which declares that no law shall be passed impairing the obligation of contracts, and further added, "It might also be within the limitation on

the powers of the several States, found in Article I., Section 10, of the Constitution of the United States."

See also, *Benedict* v. *Hood*, 134 Pa. St., 289, 19 Am. St., 698.

The case of *Schroeder* v. *Galland*, 134 Pa. St., 277; 19 Am. St., 691, was one in which a head contractor had stipulated to deliver the building, on its completion, to the owner free from all liens and incumbrances. The Court held that a subcontractor cannot file a lien against the building for work done or material furnished by him in its erection. The subcontractor is charged with knowledge of all the terms and stipulations of the contract between the owner and principal contractor, and is bound by them. It would be passing strange for us to hold, said the Court, "that the right of a subcontractor for part of a building is of so sacred a character that it shall not be bound by the express limitations of a written contract under which and by force of which his own contract must be performed. His right of lien has no existence at common law, or in equity. It is a creature of statute alone, but the statute confers upon him no special prerogative to transcend the most familiar principles of the law, and to claim privileges which are denied to all other citizens in the determination of their contract rights. * * * * * The owner contracts with the builder to erect a house on certain terms, and the builder makes a subcontract with a material-man to supply the materials. The claim of relationship consists of but two links, the second of which hangs by the first, and will bear no greater weight. * * * * The allowance of any lien at all to a subcontractor, is a special privilege, granted only in case of buildings; and it is not unreasonable to require him to look to the principal contract to ascertain whether it is such as to justify him in becoming a contractor under it. The argument that the law and the principal contract make the builder the agent of the owner,

Right to statutory at common law.

proves nothing. Suppose the fact to be so, still his agency is only special, limited by the terms of the contract. He is to employ men to build the house in the manner and on the terms there indicated. For anything beyond that he exceeds his authority and does not bind the principal."

The same doctrine is announced in

Dickinson College v. *Church*, 1 Watts, & S., 462.
Sharer v. *Murdock*, 36 Cal., 298.
Henley v. *Wadsworth*, 38 Cal., 356.
Bevan v. *Thackara*, 143 Pa. St., 182; 24 Am. St., 529.
Fidelity Mut. Life Assn. v. *Jackson*, 163 Pa. St., 208.
Ballman v. *Heron*, 160 Pa. St., 377, 384, 385.
Overton on Liens, Sec. 553.
Henry v. *Rice*, 18 Mo. App., 497.
Jones on Liens, 2nd Ed., Vol. 2, Secs. 1289, 1289*a*.
Note to French v. *Bauer*, (N. Y.) 20 L. R. A., 560, 561, 562, 563.

THE ACT OF 1894 IS UNCONSTITUTIONAL.

The act of 1894 runs counter to all former Ohio legislation and decisions.

Section 3184 specifies the property on which a laborer, material-man or contractor may acquire a lien. Sec. 3185 designates the time within which the lien must be taken, the necessary steps to perfect the same, and the period of the continuance of such lien. By Section 3185*a* the lien is limited to the actual value of the labor, material, or machinery furnished. In the absence of fraud or collusion between the owner and original contractor, the aggregate amount of liens is not to exceed the contract price agreed upon between the owner and the original contractor for the performing of such labor and the furnishing of such material and machinery.

If the law be valid, laborers, subcontractors and material-men may thus acquire liens in an amount not in excess of the original contract price, but wholly irrespective of the state of account between the owner and his original contractor. Although the owner may have paid in strict accordance and complied with every term of his contract, and may have so paid the full contract price for his building, yet the above mentioned sections of the Revised Statutes pretend to give laborers, subcontractors and material-men, if the original contractor fails or neglects to pay them, a lien on the owner's property for their several claims to an amount not exceeding the contract price of the house, in case such amount has been fixed without fraud or collusion. The law further provides for the enforcement of such liens regardless of how much the owner may be compelled to pay in excess of the contract price for his building, subject to the limitation above mentioned. The owner who has thus scrupulously fulfilled his contract may be required to pay for his improvement a second time. The contract price does not determine what he shall pay, or what the lienholder shall recover. The lien may be taken at any time within four months from the date of performing the last item of labor or furnishing the last item of material or machinery. No notice to the owner of the taking of a lien is required. The owner may have honestly paid for his property in full, yet at any time within four months from the date of its completion, valid liens may be filed against the same from persons possibly wholly unknown to him, and with whom he never contracted. He is constituted the guardian, as it were, of every laborer, subcontractor and material-man having anything to do with the construction of his building, whoever and wherever such person may be. If he contract to pay, and actually does in good faith pay, for his building in advance, or by the transfer of land, or by the cancellation and surrender of a previously

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existing claim held against the original contractor—and he may lawfully do any of these things—he must, nevertheless, according to the statute, pay again and *in money* to the sub-contractor to discharge his lien, and to the full amount of his contract price.

The mechanics' lien law in question interferes with the liberty and right of the subject to acquire property; to make and enforce contracts; to use, buy and sell property and contract in respect thereto; to fix the price at which labor shall be performed or materials furnished, and the mode and time of payment. It is class legislation of the most odious nature. It discriminates against the owner of real estate who wishes to improve it, and, if it does not deny his right to contract, attaches terms and conditions not affixed to any other contract which he or any one else may make. It discriminates against the financially poor contractor and in favor of the rich, because prudent owners will contract only with men who in any event are able to pay and out of their own means if necessary. It discourages the erection of homes by the poor who must limit their expenditures to a specified sum, because, under the statute, no one commencing the erection of a building can know what will be its ultimate cost.

Such a monstrous enactment could not long remain unchallenged. Its validity was attacked as soon as an occasion arose therefor in the Courts of the State in the case of *The Lion Hardware Company* v. *L. F. Young*, in the Circuit Court of Clark County, and a decision was rendered sustaining the Statute. In the November Term of 1895 of the Circuit Court of Putnam County, that Court declared the enactment to be unconstitutional, in the case of *Palmer & Crawford* v. *Tingle*, 9 O. C. C. Rep., page 708.

These cases found their way as rapidly as possible to the Supreme Court of the State, and on December 8, 1896, in the case of *L. F. Young* v. *The Lion Hardware Company*, 55

O. S., 423, the Supreme Court of the State considered and passed upon the Statute and declared the same to be unconstitutional.

The syllabus is as follows:

> "The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the Bill of Rights of the Constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are necessary for the common welfare.
>
> "Liberty to acquire property by contract, can be restrained by the general assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a Court may see that it is for such general welfare, protection and benefit. The judgment of the general assembly in such cases is not conclusive.
>
> "While a valid statute regulating contracts is, by its own force, read into, and made a part of such contracts, it is otherwise as to invalid statutes.
>
> "The Act of April 13th, 1894, 91 O. L., 135, in so far as it gives a lien on the property of the owners to subcontractors, laborers and those who furnish machinery, material or tile to the contractor is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner."

It will be seen from the statement of the case that the cause from Putnam County was based upon a contract made on the 23rd day of April, 1894, the very month the law was enacted, and that the cause from Clark County was based upon a contract made on the 29th of June, 1894, a little over two months after the passage of the Act. Hence it will be seen that the people of the State of Ohio were not remiss in calling into question the validity of the enactment.

The Circuit Court of Putnam County declared the enactment to be unconstitutional and that of Clark County

declared it to be constitutional. The Supreme Court affirmed the case from Putnam County and reversed that from Clark County and declared the statute to be unconstitutional and invalid.

It is obvious that the people of the State let no time pass in bringing the law to the attention of the Courts, and that the Courts passed upon the matter promptly and gave to the people of the State the final declaration as to the validity or invalidity of this enactment, by declaring it invalid. There has been no diversity of decision by the Court of last resort. The two cases that have been brought to its attention have both been decided the same way, hence it may be accepted as the final decision of the Supreme Court of Ohio upon this law. The decision of the Supreme Court now stands as the law of the State and is binding upon all of the inhabitants of the State. No citizen of Ohio can assert a subcontractor's or material man's lien under this statute.

THE LAW INVADES THE PROPERTY OWNER'S RIGHT OF CONTRACTING.

The right and liberty of contract being inalienable and guaranteed by the Constitution can be restrained only when necessary for the equal protection and benefit of the people, and for the common welfare. Such necessity so warranting the invasion of such right must clearly appear to the legislature, and also to the Courts of justice. No public necessity exists for denying the liberty of contract to the owner of a building, that laborers, subcontractors and material-men may collect for labor furnished and material and machinery sold, from a man who did not employ the labor or purchase the material or machinery, and who has already paid all that he was bound to pay, and for all that he received.

As stated in *State* v. *Loomis*, 115 Mo., 313, the word "liberty" includes and comprehends, among other things, the right to freely buy and sell as others may.

Second Story on Constitution, 5 Ed., Sec. 1590.

The privilege of contracting being both a liberty and property right, liberty necessarily includes the right of acquiring property and consequently of making and enforcing contracts. The constitution secures to the subject the right of using, buying, and selling property, and of contracting in respect thereto, and the legislature has no power to prevent persons who are *sui juris* from making their own contracts. *Ritchie* v. *People*, 155 Ill., 98; *State* v. *Loomis*, 115 Mo., 307; *Frorer* v. *People*, 141 Ill., 171. "The right to contract necessarily includes the right to fix the price at which labor shall be performed and the mode and time of payment. Each are essential elements of the right to contract and whosoever is restricted in either, as the same is enjoyed by the community at large, is deprived of liberty and property." *Braceville Coal Co.* v. *People*, 147 Ill., 66; 21 L. R. A., 792, 793, Note.

The Mechanics Lien Law of Ohio now in question, if constitutional, permits a subcontractor to ignore the original contract for the construction of a building, and impose upon the owner a burden never contemplated in his original contract. The law modifies and varies the contract made by the owner without notice and without his consent. It attempts to create an agent for the owner out of the contractor whose interests are opposed to those of his principal. The agent, in violation of a primary principle of law, is made to serve two masters, himself and the owner. The Mechanics Lien Law thus abrogates a settled maxim and removes one of the safeguards for the protection of individual rights.

It is true that "in many cases, the Courts, in the exercise of their ordinary jurisdiction, cause the property vested in one person to be transferred to another, either through the exercise of a statutory power, or by direct force of their judgments or decrees, or by means of compulsory conveyances," but in such cases, "the right of one man is divested by way of enforcing a higher and better right in another."

Cooley's Constitutional Limitations [3rd Ed.], Sec. 358.

The rights of the laborer, subcontractor and material-man, are no higher and better than those of the property owner. The same rights are guaranteed by the constitution to all alike.

Without the consent of the property owner, without any existing contract between him and the laborer, material-man or subcontractor, the owner's property, as proposed by the Ohio Mechanics Lien Law, shall be taken from him to pay the laborer, material-man or subcontractor for something claimed to have been done or furnished for the original contractor.

> "But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or a special enactment."
>
> Cooley's Const. Lim., Sec. [3rd. Ed.] 357.

The Mechanics Lien Law of Ohio makes the owner of real estate surety for the original contractor. One party to a contract, by force of legislation, is made surety that the other contracting party will perform his contract; in effect, the owner contracting with himself, and that too without any means of knowing the extent of his liability as surety.

Palmer & Crawford v. *Tingle*, 9 O. C. C., 708, 712.

Laborers, subcontractors and material-men are charged, in the making of contracts, with the same degree of care and caution required of persons not favored by dangerous class legislation, of ascertaining whether such third persons have any authority to encumber another person's property for either labor or material, which the contractor may find necessary to procure from others in order to complete the work. If the respondents' construction of the act of 1894 prevails, it simply means that an owner cannot, by the making of even the most 'iron clad' contract imaginable, prevent the placing on his property of an encumbrance created by others, and without his consent. Furthermore, it means that while everybody else shall pay but once for what he contracts, the unfortunate owner of land, who attempts to improve it by erecting buildings thereon, must pay twice, notwithstanding the fact that he seeks to protect himself from this palpable and really monstrous injustice by the making of an express contract that the property should be turned over to him free and clear from all liens of any kind whatsoever.

The Supreme Court of Ohio placed its objection to the law of 1894 *on the ground that it was an unreasonable and oppressive restraint on the owner's liberty of contract.* "The owner," said the Court, 55 O. S., pp. 442-443, "has the right to acquire his building upon the best terms possible, and if he can by making a contract to pay in advance, or by exchange of securities or other property, acquire his building cheaper than by contracting to pay after four months from its completion, he has the inalienable right to so acquire it, and to be protected in its enjoyment, and it is not within the power of the General Assembly to compel him to pay a higher price for his building for the protection of laborers and furnishers with whom he has no contractual relation. To enable the contractor, by force of this statute, to enlarge the price to be paid by allowing liens to be taken on the property for labor and materials,

would be as unjust as to authorize the owner by statute, to enlarge the building, without a corresponding increase in payment."

It was urged on the hearing of this case below that inasmuch as the law of 1894 had been enacted prior to the date of the contract made by the Hotel Company with McClain, that the law entered into and formed a part of the contract. This argument, the Ohio Court met by saying (p. 443):

> "But it is urged that the act is constitutional, for the reason that the statute itself must be read into the contract, and that thereby the owner agreed that the contractor may obtain labor and materials for which a lien may be taken against the owner's property. This begs the question, and assumes the constitutionality of the statute. If the statute is valid it must be read into the contract, but if invalid it binds neither party and does not become a part of the contract."

This position of the Court is abundantly sustained by authority.

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."
> *Norton* v. *Shelby Co.*, 118 U. S., 442;
> 3 Am. & Eng. Ency. of Law, 678.

> "It is now axiomatic 'that everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.'"
> *State* v. *Loomis*, 115 Mo., 313;
> Cooley's Con. Lim., [3d Ed.] Secs. 313, 314.
> *Dartmouth College* v. *Woodward*, 4 Wheat., 518.

In *Meyer* v. *Berlandi*, 39 Minn., 438, 12 Am. St., 663, a case involving the validity of a mechanics' lien law, in answer to the argument that the law enters into and forms a part of the contract, MITCHELL, J., used the following language:

> "It is no answer to this objection to say that all incumbrances, or other interests in property acquired subsequent to the passage of the act, must be deemed as taken subject to the provisions of the law which enter into and form a part of the contract. This rule, which is a familiar one, always presupposes that the law is valid. It is no more in the power of the legislature to pass a law taking from a man, without his consent, and without process of law, property which he may thereafter acquire, than it is to pass a law depriving him of property which he had acquired before its passage."

In *The State of Ohio* v. *Lessees of Public Works*, 3 Bull, 265, it was held that an unconstitutional act is simply a nullity. If the contention is right that any law, constitutional or otherwise, enters into and forms a part of a contract, then an unconstitutional law neither adds to nor subtracts from a contract. The contract will exist as an independent fact, unmodified by such unconstitutional law, and as if such law were non-existing. The contract will itself, in case the law be unconstitutional, fix the rights of the parties regardless of the pretended law, because the law being a nullity there is no law to enter into, or to be read into the contract. If the law which attempts to give to subcontractors a lien is unconstitutional then the subcontractors stand without remedy and without right to a lien.

THE LAW IS OBNOXIOUS TO THE OHIO BILL OF RIGHTS.

The Ohio Court held that restraint upon the property owner's liberty of contract is prohibited by the Ohio Bill of Rights. In speaking of the fundamental rights enumerated therein, the Court said, 55 O. S., pp. 440, 441, 442:

> "The preamble to the constitution is as follows: 'We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this constitution.'

"It is worthy of notice that the constitution is established to secure the blessings of freedom, and to promote the common welfare. As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the general assembly under the powers conferred by that instrument, are to be such as shall secure the blessings of freedom and promote our common welfare.

"To make this more emphatic, the first section of the Bill of Rights provides that 'All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.' And by the second section it is provided that, 'All political power is inherent in the people. Government is instituted for their equal protection and benefit.'

"The usual, and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract when made and entered into, can not be inpaired by act of the general assembly. Article 2, Sec. 28.

"The word 'liberty' as used in the first section of the Bill of Rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. *People* v. *Marks*, 99 N. Y., 377; 52 Am. R., 34; *Berthof* v. *O'Reilly*, 74 N. Y., 15; 30 Am. R., 323; *Matter of Jacobs*, 98 N. Y., 98; 50 Am. R., 636.

"Contracts and compacts have been entered into between men, tribes and nations during all time from the earliest dawn of history, and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our constitution, and it may be restrained only in so far as it is necessary for the common welfare, and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common public welfare, and equal

protection and benefit of the people, must appear not only to the general assembly, by force of popular clamor, or the pressure of the lobby, but also to the courts, and it must be so clear, that a court of justice in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people. *People* v. *Gillison*, 109 N. Y., 389. 4 Am. S. Rep., 465.

"The statute in restraint of the liberty to contract as to the interest on money, is valid for the reason that all can see that it is for the common welfare.

"Many other like cases of restrainst as to contracts are to be found in our statutes, but all of them, in so far as they are valid, depend for their validity upon the same principle. It was the infringement of the liberty of contract that induced this Court in *State* v. *Lake Erie Iron Co.*, unreported, to hold the statute unconstitutional which required corporations to pay their employes at least twice in each month. Our exemption laws can be sustained only on the ground, that while they in a slight degree limit the liberty of contract, such limitation is for the general welfare of the whole people, and does not interfere with their equal protection and benefit.

"In such cases Courts can see that the slight restraint of the liberty of contract, is for the common welfare of the people, but no Court can see that it is for the common public welfare that the liberty of contract should be taken away from the owner of a building, to enable the seller of materials to collect their value from a man who never purchased them, and has already fully paid the one with whom he contracted for all that he has received. There can be no public necessity for making the contractor the agent of the owner, to enable the seller of materials to collect his pay from one who does not owe him, and with whom he has no contract.

"An agent can have no interest adverse to his master, but this statute attempts to create an agent for the owner out of the contractor who is opposed to him in every interest. It is an attempt to make the contractor serve two masters, himself and the owner. This cannot be done. For this we have the highest authority."

The Ohio decision was not based on any claim on the Court's part of the right to pass on the propriety of this or that legislative enactment. The law was held to violate certain specified provisions of the Bill of Rights in that it invaded the right of contract.

Cooley, in his Constitutional Limitations, 6th edition, after enumerating on pages 47 and 48, the usual contents of Bills of Rights, among which will be found those embodied in Sections one and two of Article one of the Constitution of Ohio, says, on page 209: "Nor, where fundamental rights are declared by the Constitution, is it necessary at the same time to prohibit the Legislature, in express terms, from taking them away. *The declaration is itself a prohibition, and is inserted in the Constitution for the express purpose of operating as a restriction on legislative power.*"

"A Bill of Rights," says Black in his work on Constitutional Law, page 9, "is in the nature of a classified list of the rights and privileges of individuals, whether personal, civil or political, which the Constitution is designed to protect against governmental oppression. It is a charter of liberties for the individual, and a limitation upon the power of the State." As said in *Van Horn's Lessee* v. *Dorrance*, 2 Dall, 304, 311, "The Constitution is the origin and measure of legislative authority"; and as the Legislature is itself a creature of the Constitution, owing its existence to it and deriving its powers therefrom, its acts must be conformable to it or else they will be void. It is not only the province but the duty of the Court to determine when the Legislature has exceeded its authority. This duty was performed in the Young case.

While there must be a clear violation of the Constitution to warrant the judiciary in declaring an act of the Legislature unconstitutional and void, "still, there is reason and authority for holding that if a statute is contrary to the

spirit of the constitution and the implications necessarily drawn from it, or to the fundamentals of justice and good government, or to those cardinal principles of the social compact which underlie all legislation and enter into the frame work of representative government, it is in the power of Courts to pronounce it void." 3 Am. & Eng. Ency. of Law, 674.

The statement of this doctrine is found in the early cases of *Calder* v. *Bull*, 3 Dallas, 386; *Wilkinson* v. *Leland*, 2 Pet., 657, and is reaffirmed in the 165 U. S., pages 159, 160, where it is said:

> "The first official action of this nation declared the foundation of the government in these words: 'We hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declarations of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases recourse must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and spirit, and it is always safe to read the letter of the Constitution in the spirit of the declaration of independence. No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

If for the sake of argument it be conceded that the question herein involved is merely one of general law having as much reference to the Constitution of any other State as to that of Ohio, as claimed by the Circuit Court of Appeals and by opposing counsel, still the lien law of 1894 is unconstitutional, because the act is contrary to the great first principles of the social compact and cannot be considered a rightful exercise of legislative authority.

Calder v. *Bull*, 3 Dall., 386.

As said by Mr. Justice CHASE in his opinion, a law that destroys or impairs the lawful private contract of citizens, or a law that takes property from A and gives it to B, is one which it is against all reason and justice for a people to entrust a legislature with power to enact, and it cannot, therefore, be presumed that they have done so. "The people of the United States," said he, "erected their constitutions or forms of government to establish justice, to promote the general welfare, *to secure the blessings of liberty*, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican government, that no man should be compelled to do what the laws do not require, nor refrain from acts which the law permits. There are acts which the Federal or State legislature cannot do without exceeding their authority. There are certain vital principles in our free republican government, which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law, or to take away that *security for personal liberty or private property*, for the protection whereof the government was established. * * * An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act,

which when done, was in violation of no existing law; a law that *destroys or impairs the lawful private contracts of citizens;* a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature and the spirit of our State governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes; and establish rules of conduct for *all* its citizens in future cases; they may command what is right and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent, lawful, private contract; *or the right of private property.*"

Calder v. *Bull*, 3 Dall., 386.

The Ohio law of 1894 destroys the security for personal liberty and private property. It takes away A's property to give it to B, with whom A has nothing in common and no privity of contract.

That a law which runs counter to the fundamental principles of the social compact is beyond the sphere of legislative authority, both State and National, is announced also in—

Osborn v. *Nicholson*, 13 Wall., 662;
Gunn v. *Barry*, 15 Wall., 623;
Taylor v. *Porter*, 4 Hill., 146;
Wynehamer v. *People*, 13 N. Y., 394;
Wilkinson v. *Leland*, 2 Pet., 658;
Gulf, Col. & Santa Fe R. R. Co. v. *Ellis*, 165 U. S., 150.

The Ohio Court did not interfere with or seek to overthrow the exercise of legislative discretion. It did not nullify the act of 1894 on the vague ground that it was

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opposed to the "latent spirit" supposed to pervade or underlie the constitution, which neither its terms nor its implication disclose. The same Court in *Walker* v. *Cincinnati*, 21 O. S., 41, expressly held that legislative powers must be exercised within the constitutional limitations. The limitation overstepped in the act of 1894 is found in the Ohio Bill of Rights which prohibits the invasion of the right of contract and provides for equal protection to all. "That government can scarcely be deemed to be free where the rights of property are left solely dependent on the will of the legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no Court of justice in this country would be justified in assuming that the power to violate or disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being without very strong and direct expressions of such an intention."

Wilkinson v. *Leland*, 2 Pet., 627.

> "The right of acquiring, possessing, and protecting property is natural, inherent and inalienable; it is not *ex gratia* from the legislature, but *ex debito* from the constitution."
>
> *Van Horn* v. *Dorrance*, 2 Dall., 304, 311.

It was not necessary that the Ohio Court should have found that the enactment of the law of 1894 was expressly prohibited by the constitution. It is impliedly prohibited by the Bill of Rights, and what is implied is as much a part of the constitution as what is expressed.

Ex parte Yarbrough, 110 U. S., 651.

On the hearing in the Circuit Court of Appeals, opposing counsel cited, and the learned Judge who wrote the opinion relied on *Olcott* v. *Supervisors*, 16 Wall., 678, to sustain the contention that only a question of general law is involved, and that therefore the Federal Courts should not follow the Supreme Court of Ohio. An analysis of that case distinguishes it from the case at bar. The question there involved was one of taxation—the issuance of bonds by a County to aid in the construction of a railway. The Supreme Court of Wisconsin, prior to the issuance of the bonds, had repeatedly held that the construction of a railroad was a matter of public concern, and "prior to 1870, it seems to have been well settled in Wisconsin as elsewhere," says Mr. Justice STRONG, "that the construction of a railway was a matter of public concern, and not the less so because done by a private corporation." After the bonds were issued and sold, the Supreme Court of the State held that the State had no power to authorize the imposition of taxes to aid in the construction of a railroad, and that therefore the act under which the bonds were sold was invalid. There was a change of decision after the bonds were sold, and a departure from the former rulings of the Court. The contract, when made, was by all precedents established by the State Court a valid one. Not so in the case at bar. By all former rulings in Ohio, there could be only a derivative lien in favor of a material-man or subcontractor. His rights as determined by an unbroken line of authorities were wholly dependent on those of the principal contractor. There was every reason to believe that the Ohio Court would consistently maintain the oft repeated doctrine announced by it, and it in fact did so. Jones and Laughlins and Sosman and Landis contracted with McClain subject to the future adjudication of the Ohio Court upon the statute involved, knowing that the Court had, whenever opportunity presented, announced a

doctrine in conflict with the spirit and purpose of the law of 1894. They made their respective contracts with McClain without any declaration that the law was valid. The doctrine of *Pleasant Township* v. *Ætna Life Ins. Co.*, 138 U. S., 70, applies, where it was said: "It is true that the defendant in error became the purchaser and the holder of these bonds before the last adjudication of the State Court. It did not, therefore, buy with judicial declarations, that the series of acts under one of which it claims, was in conflict with the constitution; and yet, it purchased without any such declaration that it was valid."

It may be said that the law giving a lien in favor of those who furnish labor and material for the construction of railroads (R. S. of Ohio, Secs. 3207–3211) embodies the principal of the law of 1894, in that it gives subcontractors a direct or independent lien, and is therefore an exception to the uniform character of Ohio legislation on the subject of mechanics' liens, and that the Supreme Court of Ohio in *Railway Co.* v. *Cronin*, 38 O. S., 122, and *Railway Co.* v. *McCoy*, 42 O. S., 251, were suits under that law in which liens were held good. To this we answer the constitutionality of the law was not questioned or involved in either of the above named cases, and Courts will not pass on the constitutionality of a law unless the issue be raised by the pleadings. *John Spry Lumber Co.* v. *Sault Savings Bank & Trust Co.*, 77 Mich., 199. Cooley's Constitutional Limitations (3rd Ed.), Sec. 163. Moreover, it does not appear in either of the above Ohio cases that the principal contractor had been paid. Besides the lien law relating to railway companies makes notice to the property owner an essential prerequisite to the procurement of a lien. The questions presented in the case at bar were not presented to the Court in either of the above Ohio cases. Had they been before the Court, it is manifest from the decision made in *Young* v. *The Lion Hardware Co.*, that the

law granting independent liens on the property of railway companies to subcontractors would have been held invalid. The present case arises not under a change of decision, but on an amendment to and modification of the law.

Mechan law not exercis police p

We presume it will not be seriously contended here as below, that a mechanics' lien law is an exercise of the police power. Mechanics' lien laws are not police regulations.

The purpose of a mechanics' lien law is to secure the payment of a debt due either to the original contractor or his sub-contractors, laborers and material men. As stated by Phillips on Mechanics' Liens, Sec. 9, "it is simply a right to charge the property it affects with the payment of a particular debt, in preference and priority to other debts, so far as the statute confers such preference, if all the requisitions of the statute are observed." But as stated by Justice BREWER, 165 U. S., 158: "A mere statute to compel the payment of indebtedness does not come within the scope of police regulations." If mechanics' lien laws do fall within the scope of police regulations, the Ohio law has over-stepped the constitutional limits, for as stated by Justice BREWER, regarding the Texas law above mentioned, "Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained."

Owners of real estate constitute the only class of individuals punished by the mechanics' lien law of Ohio, and they are visited with a penalty not on account of any delinquency of their own, but on account of the delinquency of their original contractors.

Unconstit tional fea not obvia by taking from contracto

It was urged before the Ohio Court in support of the constitutionality of the law and to evade the contention that it leaves the owner of property without protection and deprives him of his property without due process of law, that the

owner may require a bond from the original contractor that all claims against the building shall be paid and that the owner shall be protected against any payment, loss, cost, damage or expense outside of the original contract price. The argument was met by the Court as follows (55 O. S., p. 443):

> "It is further urged that the owner has the means of protecting himself against loss by taking a bond or withholding payments for four months, or collecting his loss from the contractor, and that statutes in restraint of the liberty of contracts are in such cases constitutional. There are cases which so hold, notably *Mallory* v. *La Cross Abbattoir Co.*, 80 Wis., 170. But even in that case it was held that the means of protection must be adequate. It can not be said that the means suggested would be adequate under the statute in question to protect the owner against loss, as he would likely have to pay a higher price in case he should delay payment or require a bond, or undertake to pay for the labor and material himself. And as to collecting from the contractor, there would be no necessity of taking a lien in case of his solvency, and in case of his insolvency, the loss would fall on the owner. *The suggested means of protecting the owner from loss are therefore not sufficient to compensate him for the loss of his liberty to contract to the best advantage, and besides there is no public necessity for singling out owners and laying such heavy burdens upon them for the benefit of a favored class attempted to be created by this statute, and to do so would not be for the general welfare and equal protection and benefit of the people.*"

The Supreme Court of Minnesota, in *Bardwell* v. *Mann*, 48 N. W., 1120, has conceded that if the mechanics' lien law of that State (being a law similar to that of Ohio) is unconstitutional *it could not be rendered valid by the mere fact that the owner could relieve himself by requiring his contractor to give a bond.*

To require the property owner to secure himself by exacting a bond from the original contractor and looking to a

recovery for damages from the original contractor and his bondsmen for injuries sustained, in case he be required by reason of subcontractors' liens to pay in excess of the contract price, is to impose litigation and needless expense on the owner of the property. It compels the owner first to surrender his property to persons with whom he has no contractural relations, to wit: subcontractors, laborers and material-men, and then should he desire to be placed in the condition in which he would have been by the terms of his original contract had it been observed, he is remitted to the uncertainties of a damage suit against the head contractor and his bondsmen. These bondsmen are as sureties favored in law and they stand upon the very letter of their contract. It is proposed to elevate subcontractors and laborers into a favored class at the expense of the property owner. They are to be freed from expense of litigation. They may contract with impunity with any original contractor, and without exercising the prudence which men ordinarily exercise in business transactions. The burden all rests on the property owner.

This question has been touched upon by the Supreme Court of Massachusetts, in *Commonwealth* v. *Perry*, 155 Mass., 117, 31 Am. St., 533, wherein it was held that a statute which provides that "no employer shall impose a fine upon, or withhold the wages, or any part of the wages, of an employe engaged in weaving, for an imperfection that may arise during the process of weaving," is unconstitutional, because if the statute "permit the hiring of weavers only upon terms that prompt payment shall be made of the price of good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the Constitution guarantees to

every one, when it declares that he has a 'natural, essential and unalienable' right of 'acquiring, possessing and protecting property.'" The factory man might sue the careless employe for damages, as might the property owner sue the derelict contractor; the factory man might require every employe to give bond that his work should be free from imperfections, just as the property owner might require a bond from the head contractor that he will construct a building for a given sum and save the owner from payment of anything additional. But in both cases freedom to contract is violated, and a law which compels a resort to such a remedy for protection is unconstitutional.

The contractor, though honest and skillful, may be unwilling or unable to give bond to the owner of the building. The law does not require him to give it, or the owner to demand it. The owner is not required to presume that the contractor is, or will be, dishonest, or that he will not pay his debts incurred in constructing the building. The exacting of a bond may deprive the builder of employment, and the owner the privilege of contracting with the builder he most prefers. It compels the builder in securing a bond to place himself under obligations to others.

Judge SENEY, 9 O. C. C., 710, 711, speaking of the bond feature, says:

> "It is said in answer to this, that Tingle could require the contractor to protect him, by requiring an indemnity bond or surety that he, the contractor, would pay all subcontractors and material-men; but suppose the contractor could not furnish this security, then Tingle for his own protection would be required to contract with some one else which is obnoxious to the principle of a free government. *First, it tends to create a privileged class*, viz.: parties that are enabled to furnish security, and by so doing, tends to monopoly, to the detriment of those not able to so do, and *second, it denies to the owner the right to contract with whom he pleases.* And all for

what purpose—to secure the creditor against a contract he has made with his eyes open, with a person the creditor alone has given credit to and who alone is willing to give the credit, and with whom the owner had nothing to do, and of which he had no knowledge.

It may be urged that the owner, if compelled to pay more than the contract price, may recover *damages* from the original contractor. In other words, the terms of an express contract may be ignored, the owner may be compelled to pay a debt to a man with whom he never contracted, the owner may be compelled to mortgage his property or lose it by a forced sale, and then be remitted to the uncertainty of a damage suit for reimbursement. This is to be done that material-men, laborers, and subcontractors generally, may be favored. The owner in many cases enjoys less opportunity of knowing the financial means of the contractor than do the material-men, because the owner has less opportunity of meeting and knowing the original contractor. In the case of mechanics, and the laboring classes generally (and many of them build homes), persons of small means and unacquainted with business methods—persons without bank connections and a line of credit—to remit them to a damage suit is to bankrupt them. A law driving property owners to such a remedy not only deprives them of freedom to contract, as men in all other positions may do, but is obnoxious to the principle announced in *Commonwealth* v. *Perry*, 155 Mass., 117, *supra*, and other cases announcing the same doctrine.

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If it be contended that the owner may defer the making of payments on his building until the time within which a lien may be taken has elapsed, the answer is that this interferes with the right of contract. It will advance the cost of all building, because cash or short date payments almost always cheapens prices. The argument advanced pre-sup-

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poses that both the original contractor and his subcontractors and material-men and laborers can afford to do a credit business, can afford to wait, and will wait, until the building is completed. It means that if such be not the fact, the original contractor must be a person of such large financial means that he can pay and obtain credit for the whole building and await payment for four months after its entire completion. The argument advanced by the advocates of the law tacitly admits that the law is rank class legislation —discriminating against property owners and all contractors, laborers and material-men of small means.

Equally unsound is the contention that the owner may save himself from loss by seeing to the application of the payments under his contract. This implies that he must constitute himself the guardian of material-men and subcontractors; he must use extraordinary diligence, while they need not use even ordinary care, caution and prudence. He must see that men who are unknown to him and with whom he has no contract, are protected against their own supineness. This devolves a burden on the property owner not placed on any other contracting party, and deprives him of the right to contract except only with reference to a monied consideration.

It is said *the owner* can avoid the harsh features of the law by being *his own builder*. That is to say, he may contract with another to do for him any lawful thing whatsoever except to construct and improve as mentioned in Section 3184, R. S. No matter what the property owner's occupation may be, or how fully his time is engrossed by his own business, or to what extent he may be inconvenienced on account of other cares, or want of knowledge as to the construction of a building, he must, it is suggested, under the Ohio law, to protect himself in acquiring a home, become his own builder. How could a traveling man, an employe

of a shop, many clerks in stores, and large numbers of professional and business men, construct homes for themselves if compelled to give the construction thereof their personal supervision. They would in almost every instance be swindled. They would be subjected to a hardship and burden imposed on no other class of citizens and by an offensive law which has no application as to any other kind of contract.

DECISIONS ON MECHANICS' LIEN LAWS IN HARMONY WITH THAT OF THE SUPREME COURT OF OHIO.

The case of *Palmer & Crawford* v. *Tingle*, was passed on in the Third Circuit, 9 O. C. C., 708. The language of SENEY, C. J., and the reasons assigned by him for declaring the law unconstitutional are so appropriate that we quote at length, as follows:

> "Prior to the enactment of the statute referred to, it was unknown in this State that a liability could be created against a party without his knowledge or consent, or that the Legislature of the State could make contracts for parties or create a liability against them other than such liabilities as might be created by what is known as 'police regulations.' It appears we have been living in the "dark ages," for now we find upon the statute books the following (here follows a quotation of Sec. 3184, R. S.) * * * From this section it will be noticed—
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> 1. "*It has no application to any or all kinds of contracts*, but is limited in the operation to a special class of contracts, viz.: to persons who labor or furnish materials for the objects named in the act. This is certainly a discrimination in favor of and affording protection to a special class of citizens, which is not enjoyed by the citizens of the State in general.
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> 2. "*It places upon the owner of real estate a burden that is not borne by the owner of any other class of property.*
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> 3. "*It denies to the owner of real estate the right to enjoy and possess property, and contract in relation thereto*, as they may deem best, regardless of any 'police regula-

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tion.' As an illustration, suppose in this case, Mr. Tingle could have procured a contractor to have furnished the material and performed the labor at a considerable less price by paying the cash in advance. He could not do so for fear the contractor would not pay his sub-contractor and material men, and he, Tingle, would be compelled to pay the second time, thus denying to Tingle the right to enjoy and possess his property. * * *

4. "*It denies to the owner of real estate the right to contract with reference to his property other than upon a monied consideration.* For illustration, in the case before us, Tingle agreed to pay two notes of $250 each. The contractor, McComb, agreed to accept them. By force of this statute, even if Tingle still had the notes, Tingle would be compelled to pay the plaintiffs or have his property sold to pay them, thus forcing him to pay money where his contract called for the notes. * * *

5. "*It makes the owner of real estate security for the contractors*, the person with whom he contracts, to the extent of defeating him in the enjoyment of his property. Could a more monstrous doctrine be enunciated? Just reflect upon it a minute. One party to a contract, by force of legislation made security that the other contracting party will perform his contract; in effect the owner contracting with himself."

"The principle of constitutional law applies here that no one can be deprived of his property without his consent."

Overton on Liens, Section 536.

Citing *Brown* v. *Sullivan*, 5 Pike (5 Ark.), 221.

"The sub-contractor will be bound by the terms of the contract between the contractor and the owner of the building. Any statute or rule which should in any way deliver him as a workman from the obligation undertaken by his superior, *would at once violate the constitutional provision against laws which would impair the obligation of contracts.* A person making a sub-contract is presumed to make it knowing the agreement of the principal contractor, and to make his in strict subordination to it. But this is held so far only as the owner and contractor have acted openly and in good faith without concealment." Overton on Liens, Sec. 553.

The lien of the material-man and other subcontractors must be determined and controlled by the terms of the original contract, as such lien claimants are conclusively presumed to have made their contracts in accordance with and subordinate to the original agreement.

> "Subcontractors who furnish labor or materials for the erection of a building, are required to take notice of the terms of the principal contract, and the owner is protected in making payments to the principal contractor in accordance with the terms of his contract unless notified of claims for material or labor furnished before such payments are due."
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> *Stewart* v. *Wright*, 52 Iowa, 335.

In deciding the case the Court spoke as to the *constitutionality* of a law which runs counter to the doctrine above announced and in the following language:

> "If one should contract with a builder to erect a house and agree to pay him in advance and comply with his contract by making the payments, *we very much question whether it is within the power of the Legislature to require that he shall be liable to pay for his building twice, by paying off claims of subcontractors who may assert liens after the payments have been made.*"

Michigan and cases

A law similar to that enacted by the Ohio Legislature in 1894, came in review before the Supreme Court of Michigan, in *John Spry Lumber Company* v. *Trust Co.*, 77 Mich., 199. The second section of the Michigan law provided: "Such lien shall not be defeated by any contract, agreement, or understanding between the owner, part owner, or lessee of the real estate upon which such improvements are made or for which such materials are furnished, and the original, or any subcontractor by any payment made by such owner, part owner, or lessee to such contractor or subcontractor, for the contract price of such labor or material (materials) or any part thereof, in case the persons performing such labor or furnishing such material shall comply with the provisions of

this act." Under that law, as in the case of the Ohio Law, "The building contract made with any person, whether man or woman, has no effect on the lien, whether fully performed by the land owner or not."

The law was declared unconstitutional, because "it strikes at the foundations of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required and his freedom from default is no defense. He may pay in full, in advance, or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter excepting as a fact which binds no one and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer. * * * In *Hanes & Co.* v. *Wadey*, 73 Mich., 178, the validity of the law was not discussed, as it has not been in any other case hitherto."

The case above quoted was followed in *Mellis* v. *Race*, 78 Mich., 80; *Snell* v. *Race*, 78 Mich., 334, and in *Waters* v. *Wolf*, 162 Pa. St., 153, 170.

In passing on the Minnesota Mechanics Lien Law, enacted in 1887, which made the lien of a mechanic or laborer, prior to that of any other incumbrance, and provided that a failure of the owner to enjoin a person furnishing labor or material for a building should be conclusive evidence that it was furnished with the owner's consent, MITCHELL, J., in the case of *Meyer* v. *Berlandi*, 39 Minn., 438, 442, 12 Am. St. 663, 666, said:

> "As liens are an incumbrance upon the owner's property it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent or by due process of law.

The basis of the right to enforce a claim, as a lien against property, is the consent of the owner, and it is upon this principle alone that laws giving liens to subcontractors are sustained. The contract of the owner with the contractor is, under the law, the evidence of the authority of the latter to charge the property with liabilities incurred by him in performing his contract. *O'Neil* v. *St. Olaf's School*, 26 Minn., 329; *Laird* v. *Moonan*, 32 Minn., 358."

In the same case he further said (p. 670, 12 Am. St.): "No one can be deprived of his property without his consent except for public use, nor without due compensation first being made. Overton on Liens, Sec. 536. *Brown* v. *Morison*, 5 Ark., 217. *Croskey* v. *Northwestern Mfg. Co.*, 48 Ill., 481."

We submit that the reasoning in the dissenting opinion of CASSODAY, J., in *Mallory* v. *LaCrosse Abattoir Co.*, 80 Wis., 182, is better than that of the majority of the Court who held a law like that of Ohio constitutional. Judge CASSODAY said:

"The act enables the contractor to limit his own duties, obligations, and liabilites by contract, and at the same time enables him, through the agency of a subcontractor, to bind the owner, without limitation, for all materials and labor that go into the structure. The subcontractor is not even limited to the specifications contained in the original contract, for by the terms of the act he may compel the owner to pay for what he never contracted for. It not only makes the owner, without his consent, responsible for the contractor's contracts with subcontractors, but also for his frauds. It authorizes the subcontractor to compel the owner to pay the contractor's debts after he has, without notice of any adverse claim, paid to the contractor the whole contract price to enable him to pay his own debts. It does not in terms prohibit the owner from paying in advance or paying without notice, but precludes him, as against a subcontractor, from the benefit of such payment. It authorizes the contractor, after the making of the con-

Law overthrows rules of agency.

> tract, to do what the Legislature could not then do; that is, to change the terms of his contract without the consent of the owner, and hence to impair its obligations."

In *Selma Sash, Door and Blind Factory* v. *Stoddard*, 116 Ala., 251, a law similar to that of Ohio was declarad unconstitutional on a demurrer to the bill filed by the complainant. The Alabama act declared a prior lien in favor of a subcontractor to the extent of his claim, not exceeding the entire amount agreed to be paid the original contractor merely on the presentation of his claim to the owner of the premises within thirty days after the completion of the building, without regard to the terms of the original contract for the construction of the building, and whether notice of his claim had been given by the material-man or not. There was no provision in the act which required notice, in fact or constructively, to be given to the owner. It mattered not what the terms for the construction of the building were, nor how much may have been previously paid in good faith on the contract with the original contractor, nor as to the balance due the contractor, nor that the owner had no notice or knowledge of the claim for materials furnished, or the claim of the subcontractor. By the terms of the act, if the subcontractor presented to the owner within thirty days after the completion of the building his claim for materials, or labor, and brought suit within nine months, it was sufficient to give a lien for his entire claim, provided it did not exceed the whole amount agreed to be paid for the construction and completion of the building. The Court disposed of the contention in that case by saying:

> "In *Randolph* v. *Builders & Painters Supply Co.*, 106 Ala., 501, in considering the sixth section of the mechanics' and material-men's statute (Acts of 1890–91, p. 578), we used the following language: "The 6th section of the act provides, 'That the fact the person

performing labor or furnishing materials was not notified in writing not to perform such labor or furnish such materials, by the person in whom the title was invested, at the time such labor was performed or materials furnished, shall be *prima facie* evidence that it was by and with the consent of the owner that such labor was performed and materials furnished.' This is a substantial copy of Section 5 of the Minnesota statute of 1887, except that their statute made the failure to enjoin the party not to furnish materials, conclusive evidence that it was done with the consent of the owner. Of this section, the Supreme Court of that State, in *Meyer* v. *Burlandi*, *supra*, says: 'Section 5 is also unconstitutional. As liens are an incumbrance upon the owner's property, it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent, or due process of law. The basis of a right to enforce a claim, as a lien against property, is the consent of the owner, and it is upon this principle, alone, that laws giving liens to subcontractors are sustained. The contract of the owner with the contractor is, under the law, the evidence of the authority of the latter to charge the property with liabilities incurred by him in performing his contract.' *O'Neil* v. *St. Olaf*, 26 Minn., 329; *Laird* v. *Moonan*, 32 Minn., 358; *Eufaula Water Co.* v. *Addyston*, *Pipe & Steel Co.*, 89 Ala., 555; *Copeland* v. *Kehoe*, 67 Ala., 597. It is not denied, the legislature may establish proper rules of evidence, but not to the extent of depriving one of his property without due process of law; nor is it denied, that the owner's contract is made under and subject to the provisions of the existing lien law, provided these provisions do not infringe his constitutional rights. But, suppose the owner contracts with another to erect a house, or to do any of the many things for which a lien is given under section two of this act, and he has paid, as required by section two and a half, and the work is not completed, and the contractor who is still under obligation to complete the work, and is liable for not doing so, goes forward to complete it, with labor and materials, provided on his own responsibility, without the procurement of the owner, or his having in any way obligated himself for it, having performed

Lien can be created only by owner's consent or authority.

Invalid Rule of Evidence.

his entire obligation under the law to the contractor, subcontractors and material-men, can it be maintained on any principle of right guaranteed to us, that the owner shall be held liable, without his own consent, for all that is done by the contractor in the completion of his contract? Is he required to notify subcontractors and material-men in writing, not to come on his premises, and not to aid the contractor in performing his duty? How could he even hold his contractor liable for a breach of his contract, when the latter was able and willing, even, to perform it, if he should notify the contractor's laborers and material-men in writing not to perform such labor or furnish such materials?' The section goes too far. It overreaches itself, in an effort to protect the subcontractors and material-men, at the expense of the owner, and gives them an advantage over him, which is not right or mutual. While the owner should be just toward such parties, they ought to be just to him. The law should not constitute him their guardian, without their request, and hold him liable for things he never engaged to become responsible for by contract, express or implied, in any just or fair sense." See, also, *May* v. *McConnell*, 102 Ala., 577, 580. * * * * * * "A subcontractor or material-man must take notice of the terms and character of the contract between the owner and the original contractor, and the legislature has no power to authorize a contractor to change the terms of his contract with the owner, and impose additional liabilities upon him and liens upon his land by any agreement with other parties to which the owner was not a party, of which he has no notice, and there is no provision by which he can acquire such notice or information. The statute is clearly unconstitutional and void."

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Renton v. *Conley*, 49 Cal., 185, 187, involved a law similar to that of Ohio. The material-man had furnished lumber to the contractor. No express agency was averred. The only agency relied on was the implied agency created by the statute. It was not alleged that any part of the contract price for the building remained unpaid from the owner to the contractor at the time of recording the notice of lien.

It was claimed that the material-man's lien was valid, irrespective of the fact that the owner when he first had actual or constructive notice of the lien may have paid to the contractor the full contract price when and as it became due under the contract. The law contained no provision limiting the lien to the amount which might be owing from the owner to the contractor under the contract, even though the materials were furnished at the instance of the contractor alone. Under the act and as claimed by the complainant, the property of the owner was liable for the lien regardless of the claim of the contractor against the owner of the building. The Court, however, held that where the owner had made payments to the contractor in good faith under and in pursuance of the contract before receiving notice either actual or constructive, of the liens of material-men and laborers, the building could not be charged with liens exceeding the balance of the contract price remaining unpaid when notice of a lien was given.

The same principle is announced in *McAlpine* v. *Duncan*, 16 Cal., 127, and *Bowen* v. *Aubrey*, 22 Cal., 571. The California cases are digested in note to *French* v. *Bauer*, 20 L. R. A., 561, 562.

> "A subcontractor cannot file a mechanic's lien where the written contract of the principal contractor with the owner contains the following stipulation: 'The contractor agrees that no liens shall be filed against said works, or on account of the said contractor, neither shall there be any legal or lawful claims against the contractor in any manner from any source whatever for work or materials furnished on said works.'
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> "The first section of the act of June 8, 1891, P. L., 225, which requires the written consent of the subcontractor in order to bind him by a stipulation in the contract between the original contractor and owner, that no mechanics' liens shall be filed, *is unconstitutional in that it attempts to create a debt and give a lien therefor, against the express covenant in the contract;* and the

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second section of the act, providing that the contractor shall be the agent of the owner in ordering work or materials, and that any subcontractor doing work or furnishing materials shall be entitled to a lien, notwithstanding any stipulations to the contrary in the contract between the owner and the contractor, unless such stipulation shall be consented to by said contractor, is unconstitutional in that it attempts to frame a new contract and substitute it for the one made by the parties.

"The indefeasible right to acquire and possess property, secured by Article I., Section 1, of the Constitution of Pennsylvania, necessarily includes the right to make reasonable contracts for the improvement of property, and a contract that no mechanics' liens shall be filed is not unreasonable as to either contractor or subcontractor. Such interference with the indefeasible rights of freedom of contract in the acquisition and protection of property as is attempted by the second section of the above act, the people have plainly reserved from legislative power.

"Whatever reasonable regulations the Legislature might make as to notice to subcontractors and materialmen of the terms of the contract between the owner and the only one with whom he bargains, the principal contractor, such as that it shall be in writing and shall be recorded, would be clearly within legislative power."

Waters v. *Wolf, Exrx.*, 162 Pa. St., 153.

The case of *Henry* v. *Rice*, 18 Mo., App., 497, is an instructive one. From the opinion rendered therein it appears that "the first secton of the mechanics' lien law (Sec. 3172, R. S.) gives to every mechanic or other person, who shall do any work upon or furnish any material for any building, etc., under or by virtue of any contract with the owner, or his agent, contractor or subcontractor, a lien upon such building."

The owner of the building had in that case paid the full amount of the contract price. A suit was brought against her property on a mechanics' lien, and it was held:

"Where in a suit by a material-man to enforce the statutory lien for materials furnished to a contractor for a building, against the property, it was pleaded by the owner, and established by the proof, that under and pursuant to the owners' contract with the contractor, she fully paid him the whole contract price for the building, every dollar of which was applied to the liquidation of claims for work and materials thereabouts; and did so in good faith and without any knowledge whatever of the existence of plaintiffs' demand. *Held*, that the contractor himself could not enforce a lien beyond the contract price, and that the subcontractor or material-man, can occupy in this respect, no better position. That he who deals with a special agent, must take notice of the extent of his authority and the limitations upon his office. That the basis for the lien given by the statute against the property owner is the principle of substitution, and the party substituted by operation of law could occupy no better position than he for whom he is substituted. That there is created by the statute, a privity between a subcontractor and contractor, and the subcontractor, is in law, presumed to have notice of the terms of the contract between the owner and the contractor and the looking to the building, and not to the contractor's credit is an admission of knowledge of the contract relation between the owner and contractor. *Held*, further, that if the owner paid the contractor in full the contract price, in good faith, without knowledge of the plaintiff's demand and that the money so paid went to the satisfaction of claims for work done and materials furnished on the building, it is, in legal effect, the same as if the owner had paid the contract money directly for the work and materials to the subordinates, and that her property cannot be subjected to the plaintiffs' demand for the excess. *Garnett* v. *Berry*, 3 Mo., App., 205."

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In commenting on Sec. 3172, above mentioned, it was said by PHILLIPS, P. J. (pp. 509, 510):

"It must be admitted that this language is quite broad. But it should receive such construction as, while upholding its true object and preserving its spirit, yet,

would not allow it to become an intolerable oppression, or to impinge upon deep-rooted principles of universal justice, or to strike down the inviolability of property rights, against the consent of the owner. No Court has as yet exhibited the temerity to assert that the contractor himself could enforce a lien for one dollar's worth of work or material beyond his contract price. By the express provision of the statute, his right to the lien depends and rests upon the existence of a *contract* between him and the property owner. That his subcontractor, who never saw nor communicated with the owner, can occupy in this respect a better position than the principal contractor, must strike the judicial mind as violative of every principle of recognized law and every dictate of justice. Such a right cannot stand on the doctrine of principal and agency. *Deardorff* v. *Everhartt*, 74 Mo., 37. He who deals with a special agent must take notice of the extent of his authority and the limitations upon his office."

We are not, however, remitted solely to decisions on mechanics' lien laws for support of our position.

OTHER DECISIONS INVOLVING THE SAME PRINCIPLE.

Inheritance tax levied on estate.

State v. *Ferris*, 53 O. S., 314, 34 Bull, 203, involved the constitutionality of the law imposing a direct inheritance tax. That law exempted from taxation the right to receive or succeed to estates not exceeding twenty thousand dollars in value, and taxed the sole right of receiving or succeeding to estates which exceed that sum in value. It also taxed at a higher rate percentum the right to receive or to succeed to estates of a larger value than to estates of a smaller value. The law was held unconstitutional as contravening Section 2 of the Bill of Rights of the Constitution of Ohio, and the Fourteenth Amendment to the Constitution of the United States.

Says BURKET, J., 53 O. S., 336:

> "If government is instituted for the equal protection and benefit of the people, it follows that laws which are passed under government so instituted, must likewise be for the equal protection and benefit of the people. This statute fails to protect equally the people who exercise the right and privilege of receiving or succeeding to property."

In *Gulf, Colorado & Santa Fe R. R. Co.* v. *Ellis*, 165 U. S., 150, the Supreme Court of the United States passed on an act of the Texas Legislature which provides that any person in that State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railroad company, provided such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock is killed or injured, against any railway corporation operating a railroad in such State, and the amount of the claim does not exceed fifty dollars, may present a verified claim for payment to such corporation and file it with any station agent thereof in any county where suit may be instituted for the same, and if such claim be not paid or satisfied within thirty days after the filing thereof, suit may be immediately instituted thereon in a proper court, and if such claim be established and judgment be obtained for the full amount thereof as presented for payment to such corporation, the party so presenting such claim shall be entitled to recover the amount thereof and all costs of suit, and in addition thereto all reasonable attorney fees not to exceed ten dollars, to be assessed and awarded by the Court or jury trying the issue, provided always an attorney be employed in the case. The law was held unconstitutional because it operated to deprive the railroad companies of property without due process of law, and denies to them

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the equal protection of the law, in that it singles them out of all citizens and corporations and requires them to pay in certain cases attorneys' fees to the parties successfully suing them, while it gives to them no like or corporation benefit. It was further held:

> "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

The principle involved in this Federal case is the same as that passed on in *Coal Co.* v. *Rosser*, 53 O. S., 12, 34, Bull., 108. Judge BREWER in his decision cited and approved the doctrine in the following cases:—

State v. *Loomis*, 115 Mo., 307, 314; *S. & N. Ala. R. R. Co.* v. *Morris*, 65 Ala., 193–9; *Wilder* v. *The Chicago & West Mich. Railway*, 70 Mich., 382; *Atchinson & Neb. R. R. Co.* v. *Beatty*, 6 Neb., 37; *Millett* v. *People*, 117 Ill., 294; *Braceville Coal Co.* v. *People*, 147 Ill., 66; *Durkee* v. *City of Janesville*, 28 Wis., 464; *State* v. *Fire Creek Coal & Coke Co.*, 33 W Va., 188 (all of which cases are cited and followed by the Supreme Court of Ohio in the Rosser case); also *State* v. *Goodwill*, 33 W. Va., 179, and *Frorer* v. *People*, 141 Ill., 171, which cases are cited and followed by the Supreme Court of Ohio in *Young* v. *The Lion Hardware Co.*

The doctrine of the Ohio Court is therefore identical with that announced by the Supreme Court of the United States.

The *Hocking Valley Coal Co.* v. *Rosser*, 53 O. S., 12, 34 Bull., 108, involved the validity of Sec. 6563*a*, R. S. of Ohio. That section provides that if a person to whom wages be due demand his wages in writing, and they be not paid within three days after such demand, and a suit be brought

therefor, if a recovery be had, as claimed in the Bill of Particulars, the judgment shall include, not only the amount claimed, but an attorney fee not in excess of five dollars, to be paid to the plaintiff's attorneys. If the defendant appeal from such judgment, and the plaintiff on appeal recover in the higher Court, a like sum, exclusive of interest, there shall be included in costs an additional fee, not in excess of fifteen dollars, for the plaintiff's attorney, as the Court may allow.

In holding the law unconstitutional because it contravenes Sections one and two of the Bill of Rights, it was said: "Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulct in an attorney fee if an honest, but unsuccessful defense should be interposed. A statute that imposes this restriction upon one citizen, or class of citizens, only, denies to him or them the equal protection of the law.

"It is true that no provision of the Constitution of 1851 declares in direct and express terms that this may not be done, but, nevertheless, it violates the fundamental principles upon which our government rests as they are enunciated and declared by that instrument in the Bill of Rights."

In the case of *Ritchie* v. *The People*, 155 Ill., 98, the Supreme Court of that State held a law unconstitutional which prohibited the employment of females in a factory or work-shop for more than eight hours a day on the ground that it run counter to the constitutional provision that no person shall be deprived of life, liberty or property without due process of law, substituted the legislative judgment for that of the employer and employe in matters about which they were competent to contract with each other, unreasonably interfered with the rights of citizens to enter into con-

tracts, and was class legislation in that it imposed an unreasonable burden upon one citizen or class of citizens, although it was applicable to all other classes of citizens. The syllabus of the case is as follows:

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"The right to labor or employ labor, and make contracts in respect thereto, upon such terms as may be agreed upon, is both a liberty and property right, and is included in the guaranty of Section 2, Article 2, of the Constitution, that no person shall be deprived of life, liberty, or property without due process of law.

"While the right to contract may be subject to limitations growing out of the duties which the individual owes to society, the power of the legislature to limit such right must rest upon some reasonable basis, and cannot be arbitrarily exercised.

"The act of 1893, prohibiting the employment of females in any factory or workshop for more than eight hours a day, is unconstitutional, as being partial and discriminating in its character, whether applying only to manufacturers of wearing apparel or to manufacturers generally.

"Such a statute is also unconstitutional as an arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties, and a substitution of the legislative judgment for that of the employer and employee in a matter about which they are competent to agree with each other.

"*The Legislature, in imposing an unreasonable burden upon any one citizen or class of citizens, transcends the authority entrusted to it by the Constitution, although it imposes the same burden upon all other citizens.*"

The following language, employed by MAGRUDER, J., in deciding the case is fitting:

"The privilege of contracting is both a liberty and property right. (*Frorer* v. *The People*, 141 Ill., 171). Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. (*The State* v. *Loomis*, 115 Mo., 307.) The right to use, buy, and sell property and contract in respect thereto, is protected by the constitution. * * * *In*

this country the Legislature has no power to prevent persons who are sui juris from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer. The right to labor, or employ labor, and make contracts in respect thereto upon such terms as may be agreed upon between the parties, is included in the constitutional guaranty above quoted. (*State* v. *Goodwill*, 33 W. Va., 179; *Godcharles* v. *Wigeman*, 113 Pa. St., 431; *Braceville Coal Co.* v. *The People*, 147 Ill., 66). The protection of property is one of the objects for which free governments are instituted among men. (Const. of Ill., Art. 2, Sec. 1.) The right to acquire, possess, and protect property includes the right to make reasonable contracts. *Commonwealth* v. *Perry*, 155 Mass., 117.) *And when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the constitution.* (Matter of Application of Jacobs, 98 N. Y., 98.) * * * The right to contract is the only way by which a person can rightfully acquire property by his own labor. 'Of all the rights of persons, it is the most essential to human happiness.' (*Leep* v. *St. L. I. M. & S. Ry. Co.*, 58 Ark., 407.) * * * The 'law of the land' is 'general public law binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals.' (*Millett* v. *The People*, 117, 294.) The 'law of the land' is the opposite of 'arbitrary, unequal and partial legislation.' (*The State* v. *Loomis*, *supra.*) The Legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions. The man, who is forbidden to acquire and enjoy property in the same manner in which the rest of the community is permitted to acquire and enjoy it, is deprived of liberty in particulars of primary importance to his pursuit of happiness. *If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of such right.* In line with these principles, it has been held that it is not competent, under the constitution, for the Legislature to single out owners and employers of a particular class,

and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which other owners or employers are permitted to make (*Millett* v. *The People, supra; Frorer* v. *The People, supra: Ramsey* v. *The People*, 142 Ill., 380)."

"When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the Legislature can interfere for the purpose of prohibiting the contract, or controlling the terms thereof."

Leep v. *St. L. I. M. & S. Ry. Co.*, 58 Ark., 407, 421.

"*Right to contract is both a liberty and property right.* If any person is denied the right to contract and acquire property in the manner in which he has hitherto enjoyed under the law, and which others are still allowed by the law to enjoy, he is deprived of both the constitutional right of liberty and property, to the extent that he is thus denied the right to contract.

"General laws may render that unlawful in many cases which has, prior thereto, been lawful, but laws depriving particular persons or classes of persons, of rights enjoyed by the community at large, to be valid must be based upon some existing distinction or reason not applicable to others not included within its provisions.

"A law singling out persons, corporations, or associations, engaged in any particular business, and depriving them of the right to contract as persons, corporations, or associations, engaged in other business may lawfully do, is unconstitutional and void.

"*The right to contract granted a corporation by its charter includes the right to fix the price at which labor for it will be performed, and the mode and time of payment.* Each is an essential element of the right to contract, and a restriction as to either, as it is enjoyed by the community at large, is an abridgment of the constitutional right of liberty and property."

Braceville Coal Co. v. *People*, 147 Ill., 66, 37 Am. St., 206.

The Legislature has attempted to say to the property owner, you may contract with the manufacturer to build you a buggy, or wagon, or reaper, or with a tenant to cultivate your farm and raise a crop, or with a railway company to transport your produce or live stock, and may fix the price you shall pay for the article or service rendered, beyond which amount you shall not be liable. You may delegate authority to your agent in person or through others to purchase produce, or grain, or merchandise, or any commodity at a given price, or to perform any act for you except to improve your property, and limit his authority, and escape liability if he or his representatives exceed the powers granted him; but if you build or improve your property, you shall not fix the limit beyond which your liability ceases. The farmer, the merchant and manufacturer may make contracts specifying a consideration beyond which amount no liability attaches, but the unfortunate owner of real estate who builds a house or improves his property to make it productive cannot make a contract in which he may limit his expenditures.

Law applies to manufacturers.

In *Godcharles* v. *Wigeman*, 113 Pa. St., 431, a puddler had received orders from his employers, the defendants, for coal and other articles, which orders were honored by the parties on whom they were drawn and paid by the defendants on presentation. Notwithstanding this fact the plaintiff brought suit against the defendants for his wages under a statute which made all orders given by employers engaged in the business of manufacturing, to their workmen, payable in goods or anything but money, void. In speaking of the sections of the act the Court, p. 437, said:

> They "are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the

> right of the employer and employe. * * * * He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing, is an infringement of his constitutional privileges, and consequently vicious and void."

If the iron or coal man may make his own contracts and determine the manner and medium of payment and the value of the services to be rendered, why may not the real estate owner, desirous of improving his property, exercise the same right.

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A law similar to that of Pennsylvania above mentioned, was passed on in *State* v. *Goodwill*, 33 W. Va., 179, 25 Am. St., 863, 869: "It is not competent," says the Court, "for the legislature, under the constitution, to single out owners and operators of coal mines, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make." That is to say, if the contract made between an owner of real estate and an original contractor does not limit the powers and rights of the contractor and his subcontractors when in all other cases the powers and rights of parties are circumscribed by the contract, the legislature has singled out a certain class and imposed on them a risk and burden which is not borne by men in any other situation.

In *State* v. *F. C. Coal Company*, 33 W. Va., 188, the Court held a law to be unconstitutional which prohibited persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies, from selling the same to their employes at a greater per cent or profit than they sell to others not employed by them, because it was class legislation, and an unjust interference with private contracts and business.

Laws appl to barbers

A Statute of Illinois made it unlawful for barbers to do business on Sunday without including any other class of business. Merchants and their clerks, restaurant keepers and their employes, clothing house proprietors, blacksmiths, livery stable keepers, owners of street car lines, and people engaged in every other branch of business, were permitted to open their respective places of business on Sunday and transact their ordinary business, but the barber, and he alone, was required to close his place of business. In passing on the validity of the statute, it was held (*Eden* v. *People*, 161 Ill., 296, 32 L. R. A., 659): "A barber is deprived of property without due process of law, by a statute making it unlawful for him to do business on Sunday, while it does not apply to any other class of business."

A similar law was declared unconstitutional and void in *Ex parte Jentzsch*, 112 Cal., 468, 32 L. R. A., 664, because it was "an undue restraint of personal liberty, and is special legislation, based upon an arbitrary classification, and not a proper exercise of the police power." As stated in that case, p. 666: "A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all." And this is the doctrine of the 165 U. S., 150.

> "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, and the mass of the community and those who make the law, by another; whereas, a like general law, affecting the whole community equally, could not have been enacted. *Wally* v. *Kennedy*, 2 Yerg., 554."
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> *State* v. *Goodwill*, 33 W. Va., 182.

THE MECHANICS' LIEN LAW OF OHIO DEPRIVES THE OWNER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

Our contention on this point is sustained by many of the cases above cited. The law in question is not applicable to or binding on all members of the community under all circumstances. It is limited to property owners who build.

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The phrases, "due process of law," and "the law of the land," are synonymous and used interchangeably. Cooley's Cons. Lim., (3d Ed.), Sec. 353; *Millett* v. *People*, 117 Ill., 294. The phrase "due process of law," means "that every citizen shall hold his life, liberty, property and immunities under the protection of the *general* rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land." Cooley's Cons. Lim., (3d Ed.), Sec. 353. In *Millett* v. *People*, 117 Ill., 294, 301, it is said of this phrase that it "means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." Such general public law must be founded on reason. *Harding* v. *People*, 160 Ill., 459. The privilege of contracting being a liberty and a property right, no one can be deprived of it without due process of law. *Ritchie* v. *People*, 155 Ill., 98 *supra*.

The fact that the property owner may refuse payment of a subcontractor's lien until compelled to pay by judicial inquiry, does not relieve the law of its obnoxious features, for the reason the statute gives a lien for the amount of the laborer's, subcontractor's and material-man's claim without any subsisting contract between him and the owner, and without notice to the owner. The effect of a judicial inquiry could only be to require proof of the amount of the claim. Recovery is wholly independent of the state of

account between the property owner and the original contractor.

As CASSODY, Judge, said in his dissenting opinion in *Mallory* v. *LaCrosse Abattoir Co.*, 80 Wis., 183: "It seems to me that a man can not reasonably be said to have due process of law, and equal protection of the laws, under an act which enables his contractor to bind him conclusively without his consent or knowledge and contrary to the express terms of their written contract, and merely permits him when sued thereon to answer to the effect that by the terms of the contract he has become so bound, and was unable to prevent it. On the contrary, before any conclusive statutory liability should be imposed upon any person, he should be guilty of some tort, or give his consent, or be in default, or have such notice as would enable him to protect himself against gross injustice, otherwise the creation of such liability is an arbitrary and unjustifiable imposition."

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The law is obnoxious to the constitution because it renders the property owner liable whether negligent or not, and whether or not he has knowledge of the failure of the original contractor to pay his liabilities, and regardless of whether or not the owner was at fault or had knowledge of the original contractors.

Jolliffe v. *Brown*, 14 Wash., 155, 158.

The law singles out and imposes restrictions on one class of people in the making of contracts, while all other classes are permitted to contract freely in their different pursuits. Conceding, for the sake of argument, the right of the legislature to pass a law, making all contracting parties liable on their contracts beyond the amount of the contract price and regardless of the same, yet, under the Constitution the restrictions must be imposed alike upon all residents of the State.or the effect of the law would be to grant privileges

and immunities upon one class of citizens which do not equally belong to all. If the law is valid the legislature would have the right to render farmers, merchants, manufacturers and any other class or classes, liable beyond the amount of their contracts and regardless of the same, to subject nine-tenths of the people, for instance, to laws of this discriminating character, and leave the remaining one-tenth to contract freely as at present.

Tacoma v. *Krech*, 15 Wash., 296.

"Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied to all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government."

Cooley's Const. Lim., sec. 391–2.

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"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act will transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such a manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their 'pursuit of happiness.'"

Cooley's Const. Lim., [3d Ed.] Sec. 393.

In the case of *Barbbier* v. *Connelly*, 113 U. S., 27-31, Mr. Justice FIELD says:

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens could be laid upon one than are laid upon others in the same calling and condition."

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"In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, *or none of these;* and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

Davidson v. *New Orleans*, 96 U. S., 107. Justice BRADLEY'S opinion;

Ky. Railroad Cases, 115 U. S., 321. Justice MATTHEWS' opinion.

Judge CASSODY, in his dissenting opinion on the mechanics' lien law of Wisconsin, 80 Wis., 186, after making the two quotations last above given, said this:

"To authorize A, through the agency of a subcontractor, to impose an arbitrary, unjust, and absolute liability upon B, without his default, and contrary to

the express stipulations in the written agreement between them, and without any notice that will enable him to protect himself against such liability, and without his violating any statute or any law, or committing any tort or wrong, is certainly to deprive B of his property or rights of property, without due process of law, and to deprive him of the equal protection of the laws. *King* v. *Hayes*, 80 Me., 206; *Ulman* v. *Mayor*, 72 Md., 587; *Garvin* v. *Daussman*, 114 Ind., 429; *Ore. R. & N. Co.* v. *Smalley*, 1 Wash., 206."

The laborer, material-man or subcontractor may delay taking his lien for four months after the completion of his work or the furnishing of his material, and until the owner shall have fully paid for his material and thus assert and successfully maintain his lien. Due process requires notice and an opportunity to be heard.

Peerce v. *Kitzmiller*, 19 W. Va., 564.

Burns v. *Multnomah R. R. Co.*, 8 Sawyer, 543.

Garvin v. *Daussman*, 114 Ind., 429.

Kuntz v. *Sumption*, 2 L. R. A., 655 (Ind.).

"Whatever the character of the proceeding by which one is deprived of his property, whether judicial or administrative, and whether it takes the property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceedings will want the essential ingredient of due process of law."

The Railroad Tax Cases, 13 Fed., 722, par. 7, Syl.

THE MECHANICS' LIEN LAW OF OHIO IS CLASS LEGISLATION.

We shall refer but briefly to this point as many of the cases heretofore cited characterize enactments of this character as Class Legislation. The law is conspicuously favorable to such contractors; it is peculiarly severe on those financially weak. It deprives the weak from competing with the strong. If the owner is compelled to look to a bond for protection, the poor contractor, no matter how honest he may be, is discriminated against in favor of the rich. He is not given a fair chance of earning a livelihood. *Such a law is legislation in favor of the rich.*

Judge BURKETT, in the *Palmer & Crawford* case, 36 Bull., 319, 55 O. S., 444, in speaking of this feature of the case, said:

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> "It is also urged by the friends of the statute, that it is beneficial in this, that it drives all the small and insolvent contractors out of business, and leaves the contracting business in the hands of those who are rich enough to guarantee their contracts. But it is not for the general welfare that small and financially weak contractors should be driven out of business. As well might poor laborers and small furnishers be driven out of business and thus leave the whole business of building and furnishing to the rich, and give them a monopoly of the whole trade, and drive the weak and poor into starvation. *Liberty and the common welfare demand that all rich and poor alike should have an equal chance, and be treated alike, and laws should be enacted for their equal protection and benefit.*
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> "With liberty and the equal protection of the laws, the weak and poor of to-day become the rich and influential of the future. And it is a narrow, unworthy, and unpatriotic policy to attempt to drive the poor and weak out of business for the benefit of the rich and influential."

Such a result is the denial of liberty to a class of citizens who appeal strongest to our sympathies; for

> "Liberty, in its broad sense as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful avocation. These principles are contained and stated in the above language in various cases, among which are *Livestock Assn.* v. *Crescent City, &c., Co.*, 1 Abb., 388, 398; *Slaughter Houses Cases*, 16 Wallace, 36, 106; *Matter of Jacobs*, 98 N. Y., 98, 50 Ap. Rep., 636; *Berthold* v. *O'Reilly*, 74 N. Y., 509, 30 Am. Rep., 323; *People* v. *Marx*, 99 N. Y., 377, 52 Am. Rep., 34."
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> *People* v. *Gillson*, 109 N. Y., 389, 4 Am. St., 468.

A law which discriminates in favor of the rich and against the poor is no part of the law of the land. The law of the land is binding upon every member of the community under similar circumstances.

> *Wally's Heirs* v. *Kennedy*, 2 Yerg., 554.
> *State* v. *Loomis*, 115 Mo., 313.

The mechanics' lien law confers on material men and laborers a privilege enjoyed by no other classes. In no other instance are subcontractors able to demand and obtain more from one contracting for a given article than the person contracting therefor agreed to pay. In no other instance can a subcontractor compel payment from one with whom he has no contract, and in excess of the amount stipulated in the original contract.

> "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that one should be subject to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted.
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> *Holden* v. *James*, 11 Mass., 396 (6 Am. Dec., 174, 178).
> *South* v. *North Ala. R. R. Co.* v. *Morris*, 65 Ala., 194, 199.

"Special privileges are always obnoxious, and discriminations against persons or classes are still more so."

Cooley's Const. Lim. (3d Ed.), Sec. 393.

To prove that the Mechanics' Lien Law is not class legislation, reference was made below to the law relating to bankers, traders, minors, married women, &c.

The fact that laws are enacted controlling in a measure the business of bankers, and traders, or applying to minors and married women only, or granting exemptions in favor of heads of families, or exempting portions of the earnings of laborers, or giving a landlord a lien on his tenant's crops, does not justify such a mechanics' lien law as that of Ohio.

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Cooley's Const. Lim. (3d Ed.), Secs. 39, and 390.

Laws affecting bankers and traders are for the benefit and protection of all the people. The whole commercial and labor world depends on the care and correct management of bankers. Laws applicable to minors and married women are based on a different principle from laws justifying mechanics' liens. Married women were at common law, under many disabilities which placed them in much the same position as minors, and for the husbanding of their property, and for their proper sustenance, support and protection, it was found necessary to care for them. The exemption in favor of heads of families applies to every person who has a family for the protection of the home. So the exemption of a portion of the earnings of a laborer is likewise for the protection of the family and it is for the benefit of the whole people that they should be protected sufficiently to prevent them from becoming a charge on the State or objects of charity. No such reasons exist for the enactment of a mechanics' lien law like the one in question. Under a law which secures to the mechanic and material-man a derivative

lien, they may, if they desire, know the very terms of the original contractor's lien and contract with him or not, as they choose. Their knowledge of the cost of building is almost invariably greater than that of the owner. The privilege accorded them of filing an affidavit with the owner before furnishing any labor or material, reciting that they are about to furnish the same, and thus stopping the payment of money to the original contractor, affords them an ample remedy, unless they make a foolish contract, and at the same time enables the owner to protect himself.

THE CLAIM THAT THE USE OF THE LABOR AND MATERIALS CREATES THE LIEN.

It is said by advocates of the law that the use of the materials and work on the property owner's premises, the putting of them into the building and improving the property gives the lien to the subcontractor or laborer for their value; that the law prevents collusion between the owner and head contractor, and prevents loss to innocent parties by reason of low contracts made by property owners with dishonest and irresponsible contractors.

Parties desiring to build rarely contract knowingly with dishonest and irresponsible parties. Beside it has not yet been shown that material-men and subcontractors are more honest than head-contractors. The owner of property under the law is left to the mercy of dishonest conniving head-contractors and subcontractors.

The taking of the mechanics' lien operates like a proceeding in attachment.

Copeland v. *Manton*, 22 O. S., 398.

In both cases the claim of the debtor is subjected to the payment of his debt. Suppose A. says to B., I will pay you a specified sum to build and deliver to me so many vehicles

of a certain kind. B. accepts the proposition and buys the wood work of C., the iron of D. and the leather trimming of E. If B. does not pay his subcontractors they may, if any ground of attachment exist, commence attachment proceedings against B. and garnishee the money due from A. to B. Their recovery is limited to what A. owes B., when served with garnishee process. A. is in possession of the vehicles, is operating them in his livery business, on his stage line, or on his street or steam railway. He has the benefit of the labor and material furnished by C., D. and E., of the property called into existence by them, as fully as the property owner who has the building constructed by subcontractors and material-men. There is as much reason for making A. pay the whole of what is due C., D. and E., without regard to the state of the account between him and B., as there is in making the property owner pay the claims of the subcontractors and material-men who labored on or furnished material for his house. If the owner by employing the original contractor puts it in his power to defraud material-men and subcontractors, so does A. in employing B. put it in his power to defraud C., D. and E. The danger of collusion between A. and B. is no greater than between the property owner and his original contractor. It is not as great as it would be between B. and C., D. and E., if they knew A. could be made to pay the claims of C., D. and E. without regard to the state of the account between A. and B. Property owners are as a rule no greater rascals than other business men. The policy of the law is to encourage the improvement of real estate, the rearing of homes and business properties. There is the same danger of A. securing to himself without compensation, the benefits of the labor and material furnished by C., D. and E. for the vehicles by means of a low contract with irresponsible and dishonest B, as there is of the property owner securing the fruits

resulting from the contributions of labor and material from subcontractors and material-men, by reason of the property owner's contract with an irresponsible, dishonest contractor. Yet no Court could be found which would hold A absolutely for the sums due C, D and E, regardless of the contract price.

But it has been said, it is not the contract which creates the lien under the statute, but it is the use of the materials and work upon the premises, of putting them into the building, and attaching them to the free-hold, which entitles the party furnishing them to a lien to the extent of their value. But the same reason holds for making A pay C, D and E in full, regardless of his contract price. A's stage line may not have a single vehicle on it, or his street car line or railway line may have no cars on it—may be wholly unproductive, as the property owner's real estate before the existence of a building. The vehicles when delivered become a part of the stage or car line and enhance its value quite as much as the building increases the value of real estate.

If the mechanics' lien law of Ohio is constitutional, the reasoning necessary to sustain it warrants the existence of laws protecting laborers, material-men and subcontractors in all callings to the same extent as those are secured who contribute to the erection of buildings.

Such legislation is paternalism.

> "Such legislation may invade one class of rights today and another tomorrow, and if it can be sanctioned under the constitution, while far removed in time, we shall not be far away, in practical statesmanship, from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental

functions. Such governmental interferences disturb the normal adjustments of the social fabric and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one."

In re Jacobs, 98 N. Y., 98, 114.
50 Am. Rep., 636, 647.

In *Henry* v. *Rice*, 18 Mo. App., 497, it was contended that the owner of the property is not injured when more material or labor goes into his building than he contracted for, as he gets the benefit of the property and the enhanced value of it. On page 512 the argument is answered in the following language:

Benefitti owner's erty doe obligate to pay.

> "To my mind there is one irrefutable answer to this suggestion: The dominion of the citizen over his private property should be held supreme. It is this sense that makes him independent and self assertive. It is the rich soil in which a free government strikes deep its roots. For its protection society exists. For its maintenance laws should be made and Courts established. Private property cannot be taken for private use against the consent of the owner, with or without compensation. No man has the right to go to the citizen unbidden and say: 'I will confer a benefit on you by improving your property and enhancing its value, but you must pay me for the office, or I will take your property away from you.' The owner may be able and willing to have erected on his lot of ground a house worth five thousand dollars, but if one costing ten thousand dollars be placed there, he is unable to pay for it. If a lien be enforced against it for the ten thousand dollars, he may lose his house and the lot, and thus be made homeless."

We close the discussion on this point by quoting an Ohio case—the underlying principle of which is deeply imbedded in the law and pervades all the decisions made in that State on the subject of mechanics' liens. The rule which was announced in *Hampson et al.* v. *The State*, 8 O., 321, 322, more than sixty-one years ago, and to which no exceptions

have been made, disposes of the argument that the property owner should pay regardless of the contract price because his property has been benefited, and ought, we think, to be adopted and followed by the Federal Courts. HITCHCOCK, J., said:

> "A contracts with B to build for him a house of specified dimensions, and for a specified price. B contracts with C to do the whole or a part of the work, likewise at a specified price, and at a price less than that which he himself is to receive from A as the work progresses. A, from time to time, makes payments to B, according to his contract, and when the work is completed, pays him off in full. Afterward it is found, however, that B has not fully paid C who has done the work, or a part of it, and C files his bill, or commences his action against A, claiming payment from him for his labor, on the ground that 'the laborer is worthy of his hire,' and that A has been benefited by his (C's) labor. True, when he performed his labor, he did it, not for, or on, the credit of A. With him he had no contract; his contract is with B, and so far as he has received payment, it has been from the hands of B. But still, inasmuch as the house, when completed, is the house of A, and is of some benefit to him, he insists that, although A has once paid for this house, he shall pay for it again. What Court would, for a moment, entertain such a claim? What lawyer would commence such a suit?"

THIS COURT SHOULD FOLLOW THE DECISION OF THE SUPREME COURT OF OHIO IN PALMER and CRAWFORD vs. TINGLE, AND YOUNG vs. HARDWARE CO., 55 O. S., 423.

Undoubtedly, the United States Courts had, and have, jurisdiction of this cause. It is a cause in which the State constitutional and statutory law of Ohio should be applied to a controversy about mechanics' liens; the State courts are the final adjudicators of questions touching the interpretation of that law; and our contention is that the United States

courts were, and are, required to administer that law, in this cause, just as the State courts would do it.

The United States courts had, and have, jurisdiction, not because of the subject matter of the controversy, but only because of the character of the parties.

There would be no harmony and no uniformity in the operation of State laws, if the United States courts should refuse to abide by the decision of the State courts upon such a question as is here agitated.

The question raised in this cause is not controlled by the Constitution, laws or treaties of the United States; nor is it a question of general law or commercial law, such as negotiable paper, insurance, and the like; nor is it a question to be controlled by principles of general jurisprudence, of national or universal application.

The question which the Supreme Court of Ohio decided in Palmer & Crawford v. Tingle, and Young v. Hardware Company, *supra*, was purely one of State constitutional and local law.

Guaranty State Constitution.

The constitution of the State, by its bill of rights, guaranteed to every citizen of the State the right to enjoy liberty and to acquire, possess and protect property. By a number of decisions of commanding authority, it has been adjudged that the right to make contracts is embraced in this constitutional guaranty; for one of the modes of acquiring property is by and through contracts.

Cases cited in a preceding subdivision of this brief, illustrate the truth of this proposition. (See page 21 *et seq.*)

The principle that a person has a right to make his own contracts is likewise one that savors of natural justice, anterior to all written constitutions. Judicial judgments which limit the operation of such a principle of natural justice ought to be expressed in the most definite and unmistakable terms, even in the absence of a constitutional restraint.

The law can create contracts for a person in only a small number of instances. It may be done where a duty is *cast* by statute, or equity, or good conscience, or in any way by the law, upon a person. It may be done where one has been benefited by another who is discharging such a duty, and where one has knowingly accepted something of value from another. In these instances, and only in these instances, can the law make a contract for a person.

The Ohio Legislature enacted a mechanics' lien statute, which, separated from its parts irrelevant to this discussion, conferred upon one who had done work upon, or furnished materials for, a building, pursuant to a contract with another, who had contracted with the owner to erect it, a lien for the price of his work and materials, upon the building and land. The statute bestowed that right upon him, not only when the owner had not given his consent to it, but also when he had no knowledge whatever of it. The statute does not limit the right to the lien to an instance when the owner stood by and saw and knew that the subcontractor was doing the work or furnishing the material.

The theory that the owner makes the head contractor his agent by making a contract with him for the erection of a building—an agent invested with irrevocable power—carries the doctrine or fiction of construction to an unreasonable and unjust limit. As a mode of constructing contracts for persons without their consent or knowledge, it is as bad as the English doctrine of constructive treason; it exemplifies how easy even judges are misled by fictions.

The Ohio Supreme Court, after mature deliberation, in the case cited, adjudged that this statute was an invasion and violation of the constitutional guaranty of the right to acquire and possess property and make contracts. The Court did not place its decision on the ground that the statute was unjust, burdensome, inequitable, or contrary to

economic principles, but on the ground that it contravened a constitutional right, created by the State constitution.

The question whether the statute had violated the constitutional guaranty was a local question. It cannot be tortured into a question of general law, or of general jurisprudence, of national or universal application. It is true that other constitutions have the same guaranty in their bill of rights.

It is equally true that not a case has been, or can be, cited, in which any other Court, either State or National, has placed a different construction from that of the Ohio Supreme Court, upon the same, the identical, constitutional guaranty.

No case ought to be a controlling authority in the present controversy as to the construction of the provision in the Ohio bill of rights, unless the facts were substantially identical with those before the Ohio Supreme Court; that is, unless the constitutional provision construed was identical with the one that was before the Supreme Court of Ohio for interpretation.

The decision of the Ohio Supreme Court was rendered before this case was instituted by Jones and Laughlins, and before the answer and cross-bill of Sosman and Landis was filed. It was rendered before any United States Court was called upon to decide the same question, which it decided.

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It is conceded that this Court has decided that the United States courts are not obliged to conform their decisions to the last decision of the State court, when contracts have been made and rights have accrued thereon, on the faith of a prior contrary adjudication of the same State court. But there is no such element in the case at bar. The Circuit Court of Appeals, from whose judgment and decree we have here appealed, conceded that the contracts of Jones and Laughlins, and Sosman and Landis, with McClain, did not belong to that category of contracts. (See 87 Fed. Rep., 674).

Contracts made on t faith of a contrary decision.

Judge Lurton's opinion on this subject is explicit. He says: "There has, therefore, been no such change of opinion by the Supreme Court of Ohio as to bring into operation the rule that the rights of the parties are to be determined according to law as it had been judicially declared when the contract was made."

We have argued in another subdivision of this brief, that not only was there "no particular state of decisions" of the Ohio Supreme Court to mislead them, but also, that the inevitable course and trend of its previous decisions was such that it should have been a warning to them that their lien would not be sustained as legal.

It is also conceded that this Court has decided, that when the State courts have not yet interpreted a State law, and contracts and transactions have been entered into by, and rights have accrued thereon to, non-residents, the United States courts may adopt their own interpretation and are not obliged to imitate a decision of the State courts rendered after such rights have accrued. But even in such an instance, this Court has further declared that it is the duty of the Federal Court to incline, "to lean," to an agreement with the subsequent decision of the State court, unless such a course would operate as an absolute denial of justice. Neither the Bill of Complaint of Jones and Laughlins, nor the Answer and Cross-bill of Sosman and Landis, discloses that there would be an absolute denial of justice to them, if the United States courts should follow the decision of the Supreme Court.

But there is another consideration. The contracts entered into by Jones and Laughlins, and Sosman and Landis, with McClain, were *not* made in the absence of previous decisions rendered by the Ohio Courts. Before those contracts were made, the highest Court of the State rendered several decisions which should have admonished them that their liens would not be valid. They were decisions which fore-

shadowed that the State Supreme Court would pronounce such a statute, as that under which they now seek to shelter themselves, to be unconstitutional, if it should prove loyal to its previous judicial utterances on similar or cognate questions. We do not mean by this that the Ohio Supreme Court had previously construed statutes exactly like this one. We are not obliged to prove such a condition of the law in order to make it manifest that the Ohio Supreme Court had, by a "course of decisions" established a rule of action "which it would be wrong to disturb." It is enough if the history of its decisions reveals that it rendered such decisions on similar laws, statutes, or questions.

In another sub-division of this brief, on pages 9 *et seq*, we have discussed those cases, and we refer the Court to that discussion.

It is only necessary now to remind this Court that, as early as 1838, in *Hampson and Parkison* v. *State of Ohio*, 8 O. 315, the Ohio Supreme Court declared in words of no uncertain sound, that to compel an owner of property who had erected a building upon it, to pay the contract price, first to the contractor, second, to pay it over again to the "subcontractors," and third, to pay it over again to the "manual operatives," would not subserve "the ends of justice." And yet, that is exactly what this statute, now under consideration, in this case at bar, would compel the owner of a building to do.

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By several prior mechanics' lien statutes, and by a number of decisions of the Ohio Supreme Court, which we have before cited, the subcontractors were compelled to acquire their liens in subordination to the contract between the owner and chief contractor; they were also assimilated to attaching creditors; they were also required to know what were the terms and conditions of the contract between the owner and chief contractor; and their liens were confined to the derivative class.

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This history of the law-making and law-expounding on the subject of subcontractors' liens, should have admonished Jones and Laughlins, and Sosman and Landis, that such a statute as the one under consideration would not receive the approval of the Supreme Court of Ohio, and that it was unconstitutional.

Relevant to the question whether this Court should follow the decision of the Ohio Supreme Court, we invite attention to the last cases decided.

The last decision of this Honorable Court, prior to the writing of this brief, was rendered in *Hartford Fire Insurance Company* v. *Chicago and Milwaukee Ry. Company*, 20 Sup. Ct. Rep., 33. The second paragraph of the syllabus reads: "Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed within one of the States of the Union, when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law, or of general jurisprudence, of national and universal application, are governed by the law of the State as expressed in its own Constitution and statutes, or declared by its highest court."

The State court had decided that a contract exempting a railroad company from liability for negligence was not against public policy; and this Court resolved that that decision was binding upon the United States Court sitting in that State. The State court decided the question twice; the first time it decided it in another case, between other parties, and the decision was that the contract was void. That decision was rendered after the agreement passed on by the United States Circuit Court was made; afterwards there was a rehearing granted and the Iowa Supreme Court reversed its former decision. A petition for a second rehearing was dismissed. The case in the United States Circuit Court was pending at

the time the other case was pending in the Supreme Court of Iowa. This Court concluded that the United States Circuit Court did right in following the last decision, instead of the first one.

This decision is decisive; it settles the controverted question in our favor; there can be no possible escape from it. Its identity on principle with this case is clear and certain on a comparison of the two conditions of fact.

A question touching the validity of a mechanics' lien is just as much a local question as a question in regard to the validity of a contract exempting a railroad company from liability for negligence. There are mechanics' lien statutes in every State, it is true; it is equally true that negligence is committed by railroad companies in every State, and that contracts exempting them from liability are made in every State.

Again, we invite the Court's attention to a case recently decided, in which the opinion was delivered by a member of this Court, Justice Harlan (O'Brien v. Wheelock, 95 Fed. Rep., 883.) The question in that case related to the validity of a drain and ditch statute, and of assessments for the purpose of constructing such a drain and ditch.

In the first paragraph of the syllabus the Circuit Court of Appeals expressed itself in this significant language:

> "While the Federal Courts in causes in their jurisdiction involving rights arising under State statutes which had not at the time received any authoritative construction by the State Courts, or the validity of which had not been adjudicated, are not bound to follow a subsequent State decision as to such construction or validity, yet, in exercising its independent judgment thereon a Federal Court should give effect to rules of construction which had previously been established by the highest court of the State, and should also lean towards an agreement of views with the State Court, and not act upon a different view, unless compelled to do so to prevent an absolute denial of justice."

It was contended in that case that, as the bonds in question were issued before the State Supreme Court had rendered any decisions, it was both the province and duty of the Federal Court to determine for itself the constitutionality of the Illinois statute, and that it should exercise its independent judgment, no matter what may have been the views expressed by the highest court of Illinois upon that question, and *Burgess* v. *Seligman*, *supra*, was cited. After quoting from that case, and after conceding that the Federal Court might exercise its independent judgment, Justice HARLAN observed: "But in doing this there are two principles that should not be overlooked: (1.) That, although that act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiff accrued, this Court should give effect *to any rules of construction that may have been previously established by the highest Court of the State when interpreting similar provisions in the Constitution of* 1848; (2.) That the Federal Courts, for the sake of harmony, and to avoid confusion, should lean towards an agreement of views with the State Courts, if the question seems to them balanced with doubt, and endeavor to avoid any unseemly conflict with the well considered decisions of the State Courts upon questions of local law."

Our opponents will, doubtless, place much reliance upon the decisions of this Court in *Burgess* v. *Seligman*, 107 U. S., 20, and *Pleasant Township* v. *Ætna Life Insurance Company*, 138 U. S., 67, which, for one purpose, we have already discussed. But we submit that these decisions do not sustain them.

The Supreme Court of Missouri did not render its decision until after the United States Circuit Court determined *Burgess* v. *Seligman*. (Page 32 and 33, 107 U. S.) The Supreme Court of Ohio decided *Young* v. *Hardware Company*,

before the case, now being argued before this Court, was instituted.

The decision in *Burgess* v. *Seligman*, must be interpreted and limited by the facts in the case.

True, the transaction between the parties to *Burgess* v. *Seligman*, occurred before there was any settled construction of the statute of Missouri; but this Court did not place any stress upon that fact; the fact that the United States Circuit Court rendered its decision before the State Court passed upon "the identical transactions" was the relevant master fact.

Nor was the diverse state citizenship of the two parties commented upon at all.

Why should there be a different rule for a case in which the parties are not citizens of the same state, and a case in which the parties are citizens of different states?

In a different kind of case, but in deciding whether the State Court should be followed, this Court answered our question by saying: "It would be unfortunate, to say the least, to have this conveyance sustained as to home creditors and avoided as to foreign."

Jencks v. *Quidwick Co.*, 135 U. S., 457.

The gist of the decision in *Burgess* v. *Seligman*, is contained in this statement: "And when the contracts and transaction have been entered into and rights have accrued thereon, under a particular state of decisions of the State tribunals, or when there has been no decision, the Courts of the United States assert the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be given by the State Courts after such rights have accrued." The dimensions of this decision cannot be extended beyond the plain meaning of these words.

Our opponents will probably endeavor to enlist *Olcott* v. *Supervisors* (16 Wall., 687), for support of their view that the question decided in *Young* v. *Hardware Company*, was neither a local question, nor one respecting the construction of the Ohio Constitution. A careful analysis of that case, however, will make it obvious that the decision does not help them. We have already commented on that case, but it is necessary to the clearness of our view to notice it again. This Court concluded, in that case, that the Supreme Court of Wisconsin, in *Whiting* v. *Fond Du Lac County*, did not decide either a local question or one of interpretation or construction. Why? Because the question which was decided was in regard to the nature of taxation, what uses were public and what were private, and the extent of unrestricted legislative power. The decision of that question did not, of course, involve, or require, an ascertainment of the meaning of any constitutional provision, as this Court declared; nor did the Supreme Court of Wisconsin purport to determine the meaning of any constitutional enactment.

But that case cannot, on logical principles, be assimilated to the case under discussion. In Young v. Hardware Company the Supreme Court did decide a question of interpretation and construction. That Court distinctly avowed that the statute creating the lien in favor of the sub-contractors was an infringement upon the constitutional guaranty of the right to acquire and possess property. This conclusion was not based upon some invisible constitutional spirit or purpose; but the particular provision of the Constitution violated was specified. The Court attached a meaning to that particular provision; it was interpreted; it was construed by the Court.

The fact that other State constitutions contain similar, or identical provisions, does not withdraw the question which the Court decided from the category of constitutional or local questions.

Two different State constitutions of the States of A and and B, may contain exactly the same provisions; the language of each may be identical. The Supreme Court of A may fasten one construction on it; the Supreme Court of B may construe it as meaning something else radically different. Both decisions, we will suppose, were rendered before the Supreme Court of the United States was called upon to decide the same question in A State. Would the latter Court follow the adjudication of A's Supreme Court, or of B's Supreme Court?

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In *Jencks* v. *Quidnick Co.*, 135 U. S., 457, this Court expressed its conclusion on this question by observing:

> "So, when the highest Court of a State affirms that a conveyance made by a debtor to a trustee for the benefit of creditors is valid under the statutes of that State, we should ordinarily in any case involving the validity of such conveyance, follow that ruling, *even though that statute was common to many States, and in others a different ruling had obtained.*"

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This decision would furnish us, too, a decisive answer to the argument of the other side based on the decisions of other State Courts sustaining mechanics' lien statutes, even if they could show that these other Courts were engaged in construing a constitutional provision just like the one construed by the Ohio Supreme Court.

Had the Supreme Courts of other States in rendering those decisions reached a conclusion antagonistic to that of the Ohio Supreme Court as to the meaning of a similar constitutional provision (which they did not do), this Court, true to its precedents and to principle, would have followed the Ohio Supreme Court. The case just cited vindicates the soundness of this statement.

Circuit C Ohio dec mechani law in fa subcontr unconsti tional.

The case of *Palmer & Crawford* v. *Tingle*, *supra*, was decided by the Circuit Court of the Third Circuit of Ohio, in November, 1895, the resolution of the Court being that the

mechanics' lien law in favor of the subcontractors, was unconstitutional. (9 Ohio Circuit Court Reports, 708.) The Circuit Court is an intermediate appellate court. It occupies the same position in our judicial system which is occupied by the Supreme Court in the New York judicial system.

"Exhibit B," attached to the Bill of Complaint of Jones and Laughlins (pages 9 and 10 and the "Transcript of Record"), shows that part of the materials furnished by them to McClain were delivered after that decision was made; and that the value of the materials so delivered amounts to the sum of $1,997.08.

"Exhibit B," attached to the Answer and Cross-bill of Sosman & Landis (pages 22, 23, 24 and 25 of the "Transcript of Record"), discloses that *all* the materials which they agreed to furnish to McClain, and for which they claim they have a mechanics' lien on the hotel building, were delivered and furnished by them *after the decision was rendered by the Circuit Court in Palmer & Crawford* v. *Tingle*, *supra*.

At the time, therefore, when Jones & Laughlins delivered $1,997.08 of the materials, and when Sosman & Landis delivered *all* the materials, which they were required to furnish under their written contracts with McClain, the mechanics' lien law in favor of subcontractors had been, by this intermediate appellate court, declared unconstitutional and void. True, they made their contracts with McClain before this decision was rendered. But is that enough? According to the decision in *Burgess* v. *Seligman*, *supra*, it was not sufficient that "contracts" and "transactions" had "been entered into," "when there had been no decision of the State Court;" the rights of the parties must, also, have "accrued thereon;" that is, on the contracts and transactions, *at that time*.

The evidence of "Exhibit B," attached to Sosman and Landis' answer and cross-bill, shows that they did not deliver a single article of the materials sold, and to be furnished by them, to McClain, till in December, 1895—*after the decision of the Circuit Court was rendered.*

Their lien did not begin till that time.

Section 3185, Revised Statutes;

Choteau et al. v. *Thompson and Campbell*, 2 O. S., 114.

Therefore, at the time they acquired their lien, the lien law for the benefit of them, for the benefit of subcontractors, had been adjudged, by said Circuit Court, void and unconstitutional.

REVIEW OF CASES CITED BY OPPOSING COUNSEL IN THE CIRCUIT COURT OF APPEALS.

It was claimed below, regarding the mechanics' lien laws similar to that of Ohio, that the Supreme Court of over twenty States have passed upon them. An analysis of cases passed upon by the several States, demonstrates that in many instances the constitutionality of the law has not been questioned, and that in many cases where the law was sustained, many of the objections raised herein were not before the Court.

The 38 O. S., 122, and 42 O. S., 251, are not in point as claimed by plaintiffs' counsel, because the constitutionality of the lien law was not in question, and the law then in force required notice to the property owner. The constitutionality of the law was in both cases assumed by both parties. The Courts will not pass on the constitutionality of a law unless the question be raised in the pleadings.

John Spry Lumber Co. v. *Sault Savings Bank & Trust Co.*, 77 Mich., 199.

Cooley's Constitutional Limitations (5th Ed.), Sec. 163.

As stated by Judge SAGE, the 38 O. S., and 42 O. S., cases were not decided under the present law which is an amendment of the lien law theretofore existing. The present case arises under an amendment of the law and not a change of decision. The point attempted to be made by appellant's counsel on the two above Ohio cases is fully answered by Judge SAGE in his opinion, to which reference is made. It should be noted that the doctrine that the claim of the subcontractor against the owner is limited to the amount due on the contract at the time he delivers his attested account against the contractor for work and material furnished, had been announced as the law of Ohio, as in the *Dun Case*, 27 O. S., 132, long prior to the 38th and 42nd Ohio State cases, and such doctrine has been continuously held by the Ohio Court to the present time.

In *Winder* v. *Caldwell*, 14 How., 444, and *Purinton* v. *The Hull of a New Ship*, 2 Curtis, 416, the constitutionality of the law was not questioned. They were, as stated by Judge SAGE, decided on other points.

In the 14 Nev., 32; 15 Nev., 58; 2 Mon., 115; 63 Ind., 17, 20; 45 Ind., 96; 80 Va., 821; 81 Va., 125; 162 Mass., 592; *Treusch & O'Connor* v. *Shyrock*, 51 Md., 162, and *Brooks* v. *Railway Co.*, 101 U. S., 446, the question of the constitutionality of the law under consideration was not considered. The issue was not raised in the pleadings. The Nevada and Maryland laws required notice to the property owner before his property could be subjected to a lien.

We have no quarrel with the doctrine of *Blauvelt* v. *Woodworth*, 31 N. Y., 285. We do not dispute the validity of any mechanics' lien law which gives the subcontractor and material-man a lien to the extent of the fund still due the original contractor from the owner, and that is all the New York statute gives. As PORTER, J., said in the above case, (p. 286), "The mechanic * * * has a specified statutory

lien *to a limited extent.*" It is where the mechanic, material-man and subcontractor asserts a lien by reason of a statute irrespective of the account between the owner and original contractor, that we deny the constitutionality of the law. We concede that a constitutional law enters into and forms a part of the original contract. *Glacius* v. *Black*, 67 N. Y., 567, did not arise on a law like that of Ohio, and simply announces the validity of the particular law then before the Court.

An examination of the case of *Hicks* v. *Murray*, 43 Cal., 515, and of the California law under which the case arose, clearly distinguishes it from the case at bar. The California owner was given an opportunity to notify the subcontractors that he would not be responsible for labor and material, and thereupon, such notice being given within three days after knowledge of the progress of the improvement reached the owner, he and his property were relieved from liability. Besides the lien attached to the building only, and the entire estate could not be taken. This is our understanding of the California law as it then stood. This view is corroborated by *Renton* v. *Conley*, 49 Cal., 187, in which a law similar to that of Ohio was held invalid. In other words, the doctrine in California is the same as in New York.

In *White* v. *Miller*, 18 Pa. St., 52, the constitutionality of the Mechanics' Lien Law was not called in question, and that case is therefore not authority on the matter involved herein. The agreed statement of facts did not present the issue raised in this case. In so far that the Court held that the owner was bound to see that the original contractor applied the money paid him by the owner in satisfaction of the material-mens' claims, the decision is in our judgment not sound. Supineness is inexcusable on the part of the material-man as well as on the part of the property owner. The material-man can not lawfully be relieved from the

caution, care and prudence which men are required to exercise in every other avocation. The doctrine of that case pushed to its legitimate results, strips the property owner of the liberty of contract.

The decision in *Laird* v. *Moonan*, 32 Minn., 358, is subject to all the objections we have heretofore urged against the constitutionality of the Ohio law. It should also be borne in mind that the Minnesota law authorizes a bond to be approved by the District Judge and by compliance with that statutory provision, the owner and his property is relieved from liens. We direct attention to this fact not because it relieves the Minnesota law from the charge of unconstitutionality as class legislation and as interfering with the right to contract, but because the Minnesota law attempts to furnish some means of protection to the property owner.

The cases of *O'Neil* v. *St. Olaf's School*, 26 Minn., 329; *Bohn* v. *McCarthy*, 29 Minn., 23, and *Laird* v. *Moonan*, 32 Minn., 358, were all decided before the case of *Meyer* v. *Berlandi*, 39 Minn., 438, and we submit that they are not in harmony with the last named case. The Meyer case was followed in the 106 Ala., 501, which held a law similar to the Minnesota law and involving the principle of the Ohio law, unconstitutional.

Taylor v. *Murphy*, 148 Pa. St., 337, is not so late an announcement of the law by the Supreme Court of Pennsylvania, as is found in *Waters* v. *Wolf*, 162 Pa. St., 153, wherein the principle involved in the Ohio law is held unconstitutional.

Provident Institution v. *Jersey City*, 113 U. S., 516, did not involve a mechanics' lien law. The same is true of *Davis* v. *State*, 3 Lea (Tenn.), 380.

This last named case simply announces a general principle without reference to any particular mechanics' lien law.

In *Gurney* v. *Walsham*, 16 R. I., 698, it appears from the decision that the Rhode Island law required notice to be given to the property owner before a lien could be taken, a provision not found in the Ohio law. The notice required by the Rhode Island law was a condition precedent to the taking of the lien. In that case, while the Court held that the law became a part of the contract, and did not impair the obligation of contracts, there was no discussion of the consequence resulting to the property owner from the operation of such a law, nor does the unconstitutionality of the law appear to have been seriously discussed. The reasoning of the Court on the point that the law enters into and becomes a part of the contract is unsound except as applied to constitutional laws.

An examination of *Reeves* v. *Henderson*, 90 Tenn., 521, reveals the fact that under the Tennessee law notice is essential to the acquiring of a lien. The constitutionality of the law was not discussed in that case, but the decision rested wholly on *Cole Mfg. Co.* v. *Falls*, 90 Tenn., 466. By reference to the last named case it appears that the property owner may require a bond by virtue of a statutory provision, and in event that the property owner is required to pay more than the contract price he may, on motion, obtain judgment against the original contractor and his bondsmen.

It will further appear that the principle of the Tennessee law had been in active operation in that State without dispute since the year 1845 (p. 475, 90 Tenn.)

Henry V. Coatsworth Co. v. *Evans*, 97 Mo., 47, is a case in which many of the objections interposed in this case were not before the Court. The Missouri law requires notice to the property owner before a lien can be acquired. The case is easily distinguished from the case at bar.

In *Paine* v. *Tillinghast*, 52 Conn., 532, the facts are so radically different from the case at bar that the Connecticut

case is no authority. In that case the liens were asserted by parties who dealt directly with the duly authorized agent of the property owner. That agent was not the original contractor but a relative of the property owner. The parties asserting liens had over them no original contractor. They were in fact themselves original contractors. The question of the constitutionality of the law was not under consideration. The question was one of agency.

In *Spokane Manufacturing and Lumber Co.* v. *McChesney*, 1 Wash., 609, the law was declared constitutional because it does not impair the obligation of existing contracts. The Court will observe that the constitutionality of the law was not discussed, except in so far as it affects the right of contract, and that the discussion did not even on that point take the wide scope that is found in the case at bar. It is not, we submit, a well considered case.

In *Merrigan* v. *English*, 9 Montana, 113, the only constitutional objection interposed was that the law interfered with the right of contract. It does not appear to have been fully discussed.

An examination of the other cases cited by counsel in their brief, discloses the fact that rarely has there been a full discussion of the points involved in this case.

It will further be found in a number of the cases where the law has been held valid, that the Courts have apologized for the law, have questioned the wisdom and propriety of such enactments, and have not considered the law on principle, but have simply followed the decisions made elsewhere, in which the constitutional questions were not raised.

For instance in *Wright* v. *Pohls*, 83 Wis., 560, the Supreme Court of that State while following its earlier decisions sustaining a law similar to the Ohio law of 1894, "appreciated the ethical objection thereto," and conceded that the Wisconsin law "is a harsh one, and will frequently operate

unjustly against owners who improve real estate," and that "its tendency must necessarily be to discourage improvements, and it would seem that by its enactment the legislature has established an objectionable public policy."

So in *Mallory* v. *LaCrosse Abattoir Co.*, 80 Wis., 175, it was said: "The theory of the law giving to laborers and material-men specific liens upon the property upon which their labor was performed or their materials used, seems to be that, because the value of such property has been enhanced thereby, it is just that the property should be specifically charged with the sums expended thereon. * * But when these restrictions for the protection of the owner were swept away, and his property subjected to a lien charge for the amount of any claim of a subcontractor against the principal contractor for labor or material used in the building or improvement, without regard to the state of the account between such principal contractor and the owner, it must be conceded that there is much room to question the reasonableness and justice of the statute which thus adds to the responsibility of the owner."

A more courageous Court would have held, as does Phillips on Mechanics' Liens, Sec. 65, that "A fundamental principle underlying the ownership of property is the right of possession and enjoyment to be disturbed only by the voluntary act of the owner. The lien of a mechanic being a remedy by which the property of one man may be taken for the benefit of another, it necessarily follows that it can only rise by the free consent of him to whom it belongs;" for "The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment; and a statute which restricts a person as to either of these essential elements of the right to contract to a mode different from that enjoyed by the community at large deprives him of liberty and property without

'due process of law.'" *Law* v. *Rees Printing Co.*, 41 Neb., 127; 43 Am. St., 670.

The decision rendered by the Supreme Court of Michigan in *Sprey Lumber Company* v. *Sault Ste. Marie Savings Bank*, *supra*, which is in unison with the Ohio Supreme Court decision in *Young* v. *Hardware Company*, and which we have already discussed to some extent, is not enfeebled by the fact that the Court did not particularize any constitutional provision that was violated by the lien statute of that State. The Court explained why that was not necessary. It affirmed this of the statute: "Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer."

And the Court expressed in no unmistakable language the abhorrent character of such legislation as that which the Court is now to consider, in this case at bar. It said: "There is no constitutional way for divesting a man's title" (to property) "except by his own act, or default. Here his own act is not required, and his freedom from default is no defense."

The other side will rely upon the decision in *M. F. G. Co.* v. *Falls*, 90 Tenn., 466, which we have before analyzed. But we repeat that there was no discussion, either by the attorneys or by the Court, of the constitutional question involved in the case at bar. The Court did determine that the statute of Tennessee did not contravene the constitutional restraint against taking property without due process of law, or the law of the land. Whether the statute contravened the constitutional right to acquire, possess and dispose of property, or the right to make contracts, was neither agitated, discussed nor determined.

The same answer may be appropriately made to the citation of the case of *Colter* v. *Frese*, 45 Ind., 96. The opinion in that case *was* a learned and able one, but it did not touch

a constitutional question. The question might have been raised in that case, but the decision is entitled to no consideration in the solution of the question made in the case at bar, because the Supreme Court of Indiana did not even think of such a question.

The decision in *Stewart* v. *Wright*, 52 Iowa, 335, is no precedent for the other side. We have presented one interpretation of this decision. To meet the contingency that that view would not be sound, we discuss it, now, from another standpoint. No constitutional question was, in terms, discussed or decided. The Court said the owner of the property, against which the mechanics' lien was sought to be enforced, was protected in making payment before notice of the subcontractor's claim, and that the latter could only enforce his lien "in subordination to the original contract." The Court further said that the statute did not prescribe the character of the contracts to be made. This case cannot be a precedent for a proposition that was neither consciously nor unconsciously in the mind of the Court.

It is true that, in *Hicks* v. *Murray*, 43 Cal., 515, the constitutionality of the mechanics' lien statute of that State was challenged; but the Court, without any argument at all, or giving any reason therefor, or for omitting discussion, decided that it was constitutional. Judge DILLON has somewhere said: "Even judicial judgments, if unaccompanied by the reasons on which they rest and which give to them their real worth, would have no recognized standing—and ought to have none—in professional estimation and regard."

The case of *Spofford* v. *True*, 33 Me., 283, has been frequently cited in the books and in this case; it has already been noticed in this brief. But we ask the Court's further attention to the case. The facts were briefly these: Land was conveyed by A. to B., upon a condition that the conveyance should be void, if payment of the purchase money

should not be made; the grant also reserved towards the payment of the price, a lien of $5.00 upon each 1,000 feet of lumber which should be taken from the land, and authorized the lumber to be cut subject to this lien. B. contracted with H. & Co. to cut, haul and drive to the boom logs at stipulated prices; H. & Co. hired laborers to cut and haul the timber. These laborers acquired liens on the logs under the mechanics' lien statute of the State, which, the Supreme Court held, were superior to the lien of A. There is certainly no parallel between that case and the case at bar; the facts in that case made an entirely different question for solution by the Supreme Court of Maine.

In *Gurney* v. *Walsham*, 16 R. I., 699, a case which we have already, in this brief, noticed, the only constitutional question was, whether the mechanics' lien law of Rhode Island impaired the obligation of contracts; and the Court disposed of the question in two short sentences. The decision does not appear to have been the result of thorough investigation.

The case of *Paine* v. *Tillinghort*, 52 Conn., 632, we have already analyzed. It was a case where the owner of the property made his brother an express agent to build a house upon his property; the brother did not disclose to the laborers and material-men that he was an agent, or who the principal was. The lienors elected to look to the owner for redress. There was no question of constructive agency discussed or decided; there is not even any analogy between the Connecticut statute and the Ohio statute; for the former gave a lien to parties furnishing material or performing labor at the instance of the owner, "or of some person having authority from, or lawfully acting for, such owner." How the decision in the Connecticut case can support the decision of the Circuit Court of Appeals, we cannot perceive.

On the case of *Roanoke, etc., Co.* v. *Karn*, 80 Va., 589, and *Frensch* v. *Shyrock*, 51 Md., 162, the same criticism may be made that has been made in regard to some of the other cases, namely, that no constitutional question was either raised or discussed. It did happen that the Courts of Virginia and Maryland did decide that the lien statutes of their respective States were valid; but neither Court was called upon to decide the question whether the statutes conflicted with the constitutions of the States, and especially the constitutional provision which guarantees the right to acquire, possess and hold property and make contracts. To make the decisions in these two cases precedents, the Court should have deliberated upon the exact question which this Court is called upon to decide in the case at bar. If there was no deliberation upon such a question, the decisions are no authority, for the proposition in dispute.

Roanok Co. v. K Va., 589 Frensch rock, 51 161, not point.

We respectfully submit that the judgment of the Circuit Court of Appeals should be reversed; but if this Court should conclude that its judgment should be affirmed, then this cause should be remanded to the Circuit Court of the Southern District of Ohio for further proceedings, since the defendant, the Hotel Company, has other defenses which can only be interposed by plea or answer.

Respectfully submitted,

J. E. SATER, AND

D. F. PUGH,

Attorneys for Petitioner.

United States Supreme Court.

The Great Southern Fire Proof Hotel Company,

Petitioner,

v.

Benjamin F. Jones, George M. Laughlins, Harry A. Laughlins, Jr., Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited, and others,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS.

JOSEPH H. OUTHWAITE,
TALFOURD P. LINN,
For Jones & Laughlins, Limited.

GEORGE K. NASH,
For Sosman & Landis.

COLUMBUS, OHIO:
THE WEEKLY LAW BULLETIN, PRINTERS.
1899.

United States Supreme Court.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY,

Petitioner,

v.

BENJAMIN F. JONES, GEORGE M. LAUGHLINS, HARRY A. LAUGHLINS, JR., BENJAMINE F. JONES, JR., doing business under the firm name and style of Jones & Laughlins, Limited, and others,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS JONES & LAUGHLINS, LIMITED.

As we interpret the decision in the case of Forsythe v. The city of Hammond et al., 166 U. S., 504, to the effect that "the power of this court to require a case to be certified to it by the circuit court of appeals under the act of March

3rd, 1891, is not affected by the condition of the case as it exists in the latter court, but may be exercised before or after any decision by that court, and irrespective of any ruling or determination therein", there is no doubt of the power of this court to grant the prayer of the petitioner herein, provided the court should find this case to be one in which the discretion of the court, acting in such matters, should be exercised in its behalf.

The sole question for the court to consider then is, does the case present such a state of facts, as will justify the affirmative action of the court, by reason either of its "peculiar gravity", the "importance of the question involved", "the necessity of avoiding conflict between two or more courts of appeal or between courts of appeal and courts of the state", or some "matter effecting the interests of this nation in its internal or external relations"?

For respondents we submit that the case does not present any such facts, or any other facts which will justify the court in granting the writ prayed for under the well known line of decisions upon this subject.

The record of the case shows,—that on April 13th, 1894, the legislature of the state of Ohio passed an act known as the Mechanic's Lien Act, by the provisions of which, direct liens were given to all persons furnishing labor or materials in or about the construction of any building within the state irrespective of the condition of account or contract between the owner of the building and such material man or laborer, upon the compliance, by the person seeking to enforce the lien, with certain requirements of the statute;

That after the passage of the said act, and before any interpretation thereof by the supreme court of the state of Ohio, respondents, Jones & Laughlins, Limited, who were residents and citizens of the state of Pennsylvania, furnished, for the

construction of a certain building within the state of Ohio, a large amount of material;

That after said material had been furnished and used, the supreme court of the state of Ohio in a suit therein pending, to which these respondents were not parties, declared such act in conflict with certain general provisions of the constitution of the state of Ohio, and liens taken thereunder invalid;

That respondents, as residents and citizens of the state of Pennsylvania, thereupon filed their bill in the circuit court of the United States, for the southern district of Ohio, seeking to enforce their lien, and invoking the jurisdiction of said circuit court by reason of their citizenship of the state of Pennsylvania, and for the further reason that their contract having been entered into and completed after the passage of said act of the legislature, and before any interpretation thereof by the supreme court of Ohio, and their right of action having accrued under such circumstances, they were entitled to relief as such non-residents, and to the independent action of the United States court, and the interpretation by the same of the constitutionality of the act in question independently of the decision of the supreme court of Ohio;

That the said circuit court thereupon decided, that respondents had a right to the independent interpretation of the United States courts upon the constitutionality of the question involved, but that, in the opinion of the said circuit court, the supreme court of the state of Ohio was right, in declaring said legislative act unconstitutional;

That thereafter, on appeal to the circuit court of appeals for the sixth circuit, the decision of said circuit court was reversed, and said circuit court of appeals decided, that respondents were entitled to the relief prayed for, and that said legislative act was constitutional.

Petitioner and respondents were the sole parties to said controversy, and the decision of the circuit court of appeals was upon their rights only.

It is admitted that the decision of the circuit court of appeals upon the question involved, but for the provisions of section six of the act of 1891, providing for the writ of certiorari, would have been final.

The case presented does not affect "the interests of this nation in its internal or external relations", nor is it one which presents a question of any general importance, the sole interests involved being those of the petitioner and respondents, and the sole controversy being over the recovery of a certain sum of money. The only ground upon which petitioner insists upon its right to the writ is, that the case presents a conflict between the court of appeals and the courts of the state of Ohio, and that by reason of such conflict, possibilities of future collisions between such courts may arise from such adverse decisions. In our judgment no such possibilities of collision exist. No other interests are involved, than those of petitioner and respondents. The adverse decision of the circuit court of appeals can affect no other interests. The decision of the supreme court of the state of Ohio is still the law of that state until reversed, and must necessarily govern all persons whether citizens of that state or citizens of other states, contracting in the state of Ohio, after the rendition of such decision.

The United States courts in any case arising upon a contract made after the rendition of such decision would be bound, under the established rules, to follow such decision, and to enforce the same as the law of the state.

The sole ground upon which relief was given respondents in this case, was, that their contract was entered into and their right of action accrued before the rendition of such decision. The decision of the circuit court of appeals applied to this con-

troversy alone, and to no other controversy, and decided no rights of other persons, nor is it binding as a future rule of action in the state of Ohio upon any person therein, or upon any foreign citizen contracting therein.

In this respect, the case differs materially from the case of Forsythe v. Hammond relied upon by petitioner. In that case this court granted the writ for the distinct reason that the adverse decisions of the circuit court of appeals, and of the supreme court of Indiana, would involve conflicts as to other property affected by the same legislative action.

The language of the court is: "This tract of plaintiffs was not on the extreme limit of the lands sought to be incorporated into the city, and if the decision of the circuit court of appeals was enforced there would be a tract of a few hundred acres within the exterior boundaries of the city of Hammond, as defined by the judgment of the supreme court of the state, withdrawn from the city's jurisdiction, and in fact excepted from its territorial limits. All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for certiorari was made".

Relying upon the rule established in Forsythe v. Hammond, and in view of the difference between the facts in that case and the case at bar, we submit that the writ prayed for herein should not be granted.

We refer the court for information as to the facts involved to the opinion of the circuit court of appeals printed in the record.

Respectfully submitted,

JOSEPH H. OUTHWAITE and
TALFOURD P. LINN,

For Respondents
Jones & Laughlin, Limited.

United States Supreme Court.

The Great Southern Fire Proof Hotel Company,

Petitioner,

v.

Sosman & Landis,

Respondents.

PETITION FOR WRIT OF CERTIORARI, UNITED STATES COURT OF APPEALS FROM THE SIXTH CIRCUIT.

Sosman & Landis in this matter, occupy precisely the same position as that held by Jones & Laughlins, Limited, and for this reason we adopt their brief, and ask the court to consider the two cases together, and to consider this brief in the same manner as if filed separately for Sosman & Landis.

The courts of the United States considered the constitutionality of the Mechanic's Lien Law of Ohio, for the reason, that the rights of Jones & Laughlin, Limited, and Sosman & Landis, arose before said law was declared unconstitutional by the supreme court of Ohio, and because these parties were non-residents of the state of Ohio. If their rights had accrued after the supreme court of the state had declared that the law was unconstitutional, under a well-known rule, the courts of the United States would not have considered their claims. No other cases can arise in the future, because all contracts entered into by non-residents, after the law was declared unconstitutional by the supreme court of Ohio, must be construed in accordance with that decision. Therefore, these cases are in a class by themselves, and the question involved is not important to any one, except to the parties to this suit.

Respectfully submitted,

GEORGE K. NASH,

For Respondent

Sosman & Landis.

No. 210.
Brf. of Linn for Respondents
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MAR 1
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No. 1[illegible]206.
Filed Mar. 10, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.
No. 210.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, *Petitioner*,

vs.

BENJAMIN F. JONES ET AL., *Respondents*.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Sixth Circuit.

ARGUMENT

In behalf of Respondents, Benjamin F. Jones, George M. Laughlin, Henry A. Laughlin, Jr., and Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlin, Limited.

TALFOURD P. LINN,
OUTHWAITE, LINN & THURMAN,
Attorneys for Respondents.

JOHN D. MCKENNAN,
Of Counsel.

COLUMBUS:
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No. 17,296.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, *Petitioner*,

vs.

BENJAMIN F. JONES ET AL., *Respondents*.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Sixth Circuit.

ARGUMENT

In behalf of Respondents, Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., doing business under the firm name and style of Jones & Laughlins, Limited.

STATEMENT.

This cause comes into this Court on a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Upon the 9th day of January, 1896, respondents herein filed in the United States Circuit Court for the Southern District of Ohio, Eastern Division, their bill of complaint in cause No. 796 in said Circuit Court, whereby they sought to foreclose a mechanic's lien upon certain property of the petitioner herein, The Great Southern Fire-Proof Hotel Company, for certain materials furnished by respondents, during the erection and construction of a fire-proof hotel, in

the City of Columbus, Ohio, by the said Company, between the 16th day of April, 1895, and the 29th day of January, 1896, under and by virtue of a written contract entered into by and between the petitioner herein, and one William J. McClain, who was, during the time set out in the bill of complaint, acting as the principal contractor for the said The Great Southern Fire-Proof Hotel Company, the petitioner herein, in the erection and construction of its said building.

The bill of complaint alleged that the complainants therein were non-residents of the State of Ohio; that the defendant, The Great Southern Fire-Proof Hotel Company was a resident of the said State of Ohio, and of the Eastern Division and Southern District thereof, and that the amount in controversy was more than two thousand dollars, exclusive of costs and interest, and asserted a mechanic's lien upon said building of the said defendant under and by virtue of Section 3184, Revised Statutes of Ohio, as amended April 13, 1894, and Section 3185 of the Revised Statutes of Ohio, and the Supplement thereto, 3185*a* of said Act of April 13th, 1894, which Acts are as follows:

> "Sec. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering, or repairing a boat, vessel or other water-craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas-well, oil-well, or any other well, or performs labor of any kind whatsoever, in altering, repairing, or constructing any oil-derrick, oil-tank, oil or gas pipe-line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof or his agent, trustee, contractor, or subcontractor, shall have a lien to secure the payment of the same, upon such boat, vessel or other water craft, or upon such house, mill, manufactory, or other building or appurtenance, fixture, bridge or other structure, or upon such

gas-well, oil-well, or any other well, or upon such oil-derrick, oil-tank oil or gas pipe line, and upon the material and machinery so furnished, and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed.

"Sec. 3185. (Filing of lien.) Such person, in order to obtain such lien, shall, within four months from the time of performing such labor, or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery or material, and a description of any promissory note or notes given for such labor, machinery, or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder, and a description of the land on which the gas-well, oil-well, or other wells are situated, or the land on which the house, mill, manufactory, or other building, or appurtenance, fixture, bridge, or other structure may stand, or to which it may be removed; and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter.

"Sec. 3185*a*. In all cases where the labor, material or machinery referred to in Secs. 3184 and 3185, shall be furnished by any person other than the original contractor, with such owner or his agent or trustee, the lien shall not exceed the actual value of labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor exceed the amount of the price

agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, material-men or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under Sec. 3184, the Court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such subcontractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price therefor, and such subcontractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

The materials furnished by the respondents herein to the petitioner herein, which were the foundation of the cause of action set out in the bill of complaint, were furnished and delivered as appeared by the said bill of complaint, to the petitioner between the dates above mentioned, to-wit: April 16th, 1895, and January 29th, 1896, and were used in the construction of the building of the petitioner before the decision of the Supreme Court of Ohio in *Young* vs. *The Lion Hardware Company*, 55th Ohio State, 423, was announced, holding that the said Section 3184, as amended, was unconstitutional, and before any decision of the said Supreme Court of Ohio had been rendered holding said section to be unconstitutional.

To the bill of complaint the petitioner herein, The Great Southern Fire-Proof Hotel Company, filed a general demurrer on the 24th day of February, 1897. (See Record, page 31.) This demurrer was argued and submitted to His Honor, Judge SAGE, who delivered an opinion sustaining the same on the 6th day of April, 1897. (See Record, page 26.)

On the 31st day of May, 1897, judgment was entered upon said demurrer sustaining the same and dismissing the bill of complaint. (See Record, page 32.)

The case was duly appealed to the Circuit Court of Appeals for the Sixth Circuit, the respondent herein assigning as

error, the judgment of the Circuit Court sustaining the demurrer, and dismissing the complaint. (See Record, pages 33 and 34.)

The case was afterwards argued and submitted on the appeal to the United States Circuit Court of Appeals for the Sixth Circuit, which Court held said section, as amended, to be constitutional, and reversed the Circuit Court. (See Record, page 44.)

It was claimed by the demurrer filed in the Circuit Court and by the arguments of counsel for the petitioner herein, The Great Southern Fire-Proof Hotel Company, both in the Circuit Court and in the Circuit Court of Appeals, that Section 3184, as amended, was unconstitutional. There was no objection to the complaint upon other grounds.

It was also further claimed and argued that the demurrer should have been sustained for the reason that the decision of the Supreme Court of Ohio in *Young* vs. *The Lion Hardware Company*, above referred to, was final and conclusive upon the Courts of the United States, and that the said Courts of the United States were bound by that decision, and foreclosed from any independent judgment as to the constitutionality of the said section, as amended. These two questions were the only questions argued and submitted by counsel and considered by the Circuit Court, and by the Circuit Court of Appeals.

It is now claimed on behalf of the petitioner herein, that the Circuit Court of Appeals erred in holding said mechanic's lien law to be constitutional for the reasons that the said law contravenes Sections 1 and 2 of the Bill of Rights, Article I, of the Constitution of Ohio; Section 28, Article II, of the Constitution of Ohio; Section 1, Article XIV, of the Constitution of the United States, and, further, that the said law having been declared unconstitutional by the Supreme Court of Ohio, the decision of that Court is controlling and should have been followed by the said Circuit Court of Appeals.

In behalf of the respondents herein, we claim,

I.

That the decision of the Supreme Court of Ohio, above referred to is not binding upon the Courts of the United States for three reasons:

(*a.*) The cause of action set out in the bill of complaint accrued before that decision was rendered.

(*b.*) The former decisions of the Supreme Court of Ohio upon similar contracts and liens, are in conflict with that decision, and the cause of action of the respondents herein accrued after such former decisions were rendered.

(*c.*) The question is one of general jurisprudence, and commercial law.

II.

That the said section as amended, does not deprive the owner of property of the right of possessing and protecting the same.

III.

That it does not deprive the owner of property of the same without due process of law.

IV.

That it does not impair the obligation of contracts.

V.

That it does not deny to certain classes, to-wit, owners of buildings or other structures described in the law, the equal protection and benefit of the law as guaranteed by Article 1, Section 2, of the Constitution of the United States, and by the Constitution of Ohio, and is not in controvention of any provision of either the Constitution of the United States, or of the State of Ohio.

ARGUMENT.

The Cause of Action set out in the Bill of Complaint Accrued before the Decision in Young vs. The Lion Hardware Company.

The cause of action which is the foundation of the suit at bar, to-wit, the material furnished, was so furnished and delivered by the respondents, and used in the construction of the hotel of the petitioner, before the decision of *Young* v. *The Lion Hardware Company*, was announced, and before any decisions holding the statute in question to be unconstitutional.

When the respondents' right of action accrued, they had the right to presume that the statute was constitutional, and and that their rights thereunder would be protected. Under these circumstances, the rule, we think, is clearly established, that the Courts of the United States will act independently; and while giving due weight to the decision of the Ohio Court, will still independently decide whether or not such decision is, in fact, correct.

Upon this point we refer the Court to the following:

> "So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the Courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid any unseeming conflict with well considered decisions of the State Courts.

As, however, the very object of giving to the national Courts jurisdiction to administer the laws of the State in controversies between citizens of different States was to constitute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

Burgess v. *Seligman*, 107 U. S., 32.

"The decision of the highest Court of a State, construing the Constitution of the State, is not binding upon this Court as affecting the rights of citizens of other States in litigation here, when it is in conflict with previous decisions of this Court, and when the rights which it affects here were acquired before it was made."

Carroll County v. *Smith*, 111 U. S., 556.

"While the Courts of the United States accept and apply the construction of a State Constitution or of a local statute, upon which the rights of parties depend, which has been fixed by the course of decisions in the State Court, it is the settled doctrine of this Court, that rights accruing under one construction will not be lost merely by a change of opinion in the State Court; and where such rights have accrued, before the State Court has announced its construction, the Federal Courts, although leaning to an agreement with the State Court, must determine the question upon their own independent judgment."

Anderson v. *Santa Anna*, 116 U. S., 356.

The rule laid down in these cases is referred to with approval in *Miller* v. *Ammon*, 145 U. S., 421, and followed in the very recent case decided in the Circuit Court of Appeals of the Sixth Circuit by His Honor Judge LURTON, in *Louisville Trust Company* v. *City of Cincinnati*,, 76 Federal Reporter, 296. The second section of the syllabus is as follows:

"Federal Court—following State decisions—Where a contract or obligation has been entered upon before there has been any judicial construction of the State

> statute upon which the contract or obligation depends, by the highest Court of the State, a Federal Court, obtaining jurisdiction of the question touching the validity, effect or obligation of such a contract will, while leaning to an agreement with the State Court, exercise an independent judgment as to the validity and meaning of such contract, and will not necessarily follow opinions of the State Court construing such statute, if such decision be rendered after the rights involved in the controversy originated."

A complete analysis of all the cases under the rule is also found in the note to *Wilson* v. *Perrin*, 11 Circuit Court of Appeals Reports, page 66.

See also—

Central Law Journal, Vol. 35, p. 322.

American & English Encyclo. of Law, Vol. 27, p. 600, and notes there cited.

Boles v. *Brunfield*, 120 U. S., 750.

Barnum v. *Okalona*, 140 U. S., 396.

This question was elaborately discussed by His Honor Judge LURTON in the decision of this case in the United States Circuit Court of Appeals, Sixth Circuit. In the opinion there delivered (Record, p. 46), we find the following:

> " When a citizen of one State enters into a contract with a citizen of another, he acquires the constitutional right to have that contract interpreted and enforced by a Court of the United States. That right does not by any means involve the application of a different rule of decision, for the Judiciary Act requires that the law of the several States shall be regarded as rules of decision, in trials at common law, where they apply. But even the decision of the highest Courts of the State, by whose law the rights of the parties are to be ascertained and enforced, does not, under all circumstances, furnish a rule of decision obligatory upon the Courts of the United States. The question is, when does it apply? In the past this inquiry has involved no little friction between the Courts of the Union and those of the

States, but the final arbiter of all such constitutional questions is the Supreme Court of the United States. So far as the inquiry is pertinent to the decision which must be here made, that Court has, in an authoritative way, decided:

"*First.* That such decisions are not necessarily obligatory upon Courts of the United States where they affect contracts which were valid under the constitution and laws of the State, as interpreted and enforced by its highest judiciary tribunals at the time they were entered upon.

Rowan vs. *Runnels*, 5 Howard, 134;
Ohio Life & Trust Co. vs. *Debolt*, 16 Howard, 432;
Gelpcke vs. *City of Dubuque*, 1 Wallace, 175;
Olcott vs. *Supervisors*, 16 Wallace, 678;
Taylor vs. *Ypsilante*, 105 U. S., 60;
Douglas vs. *County of Pike*, 101 U. S., 677;
Louisville Trust Co. vs. *Cincinnati*, 47 U. S. A., 36 to 46."

In *Rowan* vs. *Runnels*, *supra*, Chief Justice TANEY said:

"Undoubtedly this Court will always feel itself bound to respect the decisions of the State Courts, and from the time they were made regard them as conclusive in all cases upon the constitution of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this Court, were lawfully made." * * *

"*Second.* Neither are such decisions obligatory upon Courts of the United States when thereby the validity of contracts between a citizen of the State and a citizen of another State is affected, which were executed before there was any judicial construction of the statute or constitution which seemed to authorize the contract in question.

Burgess vs. *Seligman*, 107 U. S., 20–33;
Pleasant Township vs. *Aetna Life Ins. Co.*, 134 U. S., 67–72.
Louisville Trust Co. vs. *Cincinnati*, 76 Fed. Rep., 296."

This rule has been followed in the case of *Speere* vs. *The Board of County Commissioners*, U. S. C. C. Appeal Reports,

Vol. 32, page 103. The 11th section of the syllabus of that case is as follows:

> "Decisions of State Courts as to their statutes, which affect the validity of contracts between citizens of different States which were made, or under which rights were acquired, before there was any judicial construction of the statute which seemed to authorize the contracts, are not obligatory upon the Courts of the United States."

On page 113, the Court said:

> "There are, however, two reasons why the decision of the Supreme Court of Kansas, to which we have adverted is not controlling in the case at bar. The first is that it was not rendered until after the rights of the plaintiff were vested under a law which stood unchallenged and without adverse judicial construction when he purchased his warrant. The plaintiff was a citizen of Illinois. He bought this warrant and thereby entered into a contract relation with the defendant, a citizen of the State of Kansas, before the statute in question had been declared to be void. By this action he acquired the right, under the constitution and laws of the United States to have his contract interpreted, and his rights enforced in a Court of the United States, and a fortiori the right to the independent judgment of that Court upon the legal questions his case presents. This case falls within one of the recognized exceptions to the general rule which the defendant invokes. That exception is, that decisions of the State Courts which affect the validity of contracts between citizens of different States which were made, or under which rights were acquired, before there was judicial construction of the constitution or statute which seemed to authorize the contracts, are not obligatory upon the Courts of the United States."

In his opinion delivered in this case below, Judge SAGE discussed this question thoroughly, and held that it was the duty of the Federal Courts to independently look into the question of the constitutionality of the statute involved. We quote from his opinion, on page 28 of the Record:

> "The gist of the Federal cases cited is, that under the circumstances stated, the Federal Courts will not apply

the original rule that the decisions of the highest Court of the State, construing and passing upon the validity of the State statute, is binding. It will be necessary, therefore, to look into the question of the constitutionality of the statutory provisions involved, independently of the decisions made by the Supreme Court of Ohio."

Former Decisions of the Supreme Court of Ohio upon Similar Contracts and Liens, are in Conflict with the Decision of Young v. The Lion Hardware Company, and the Cause of Action of the Respondent Accrued After such Former Decisions were Rendered.

The decisions of the Supreme Court of Ohio, prior to that announced in *Young* v. *The Lion Hardware Company*, and in cases involving the same principle of constitutional construction, are in conflict with that opinion, and under these decisions, and under the law of Ohio, as understood and adjudicated up to that time, the act complained of was constitutional. Under such circumstances, the rule is equally clear, not only that the United States Courts in cases within their jurisdiction will act independently, but that if they find that former decisions of the State Courts do conflict it will follow the early decisions as to all rights accruing under them, and before the last decision."

> "Indeed the duty imposed upon this Court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of error to a State Court would be no protection to a contract, if we were bound to follow the judgment which the State Court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its Courts of Justice, its validity and obligation cannot be

impaired by any subsequent act of the Legislature of the State, or decision of its Courts, altering the construction of the law."

Ohio Life & Trust Co. v. *Debolt*, 16 Howard's Reports, p. 432.

The authorities upon this subject are reviewed in *Douglas* v. *Pike County*, 101 U. S., 677, and the rule is there stated as follows:

"The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

It is true there had been in Ohio no adjudication of the exact point decided in *Young* v. *The Lion Hardware Company*, prior to that case; but the principles involved in that decision had been settled in many cases which are, in effect, if not in words, overruled by the last decision.

As early as the First Ohio Reports, the doctrine was announced in *Smith* v. *Parsons*, p. 240, that:

"The legislature has a right by law to regulate contracts, to determine their effect and point out the mode of their discharge. These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract, in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continued what it was at its commencement; and it is mo correct to say, that the law has in part made the contract, than that it has changed it * * *. On any other view of the quesion, the power of the State to

legislate on the subject of contracts will be materially impaired; for if it be admitted that a bankrupt law, operating on an after-made contract in the manner prescribed and as was understood by the parties, be unconstitutional, or if the contracts be not made with reference to existing laws, so as to imply an assent to their provisions, it must follow that statutes of limitation, statutes against usury, gambling, sale of offices, frauds and perjuries, and the like, must be void, because they impair the obligation of contracts not prohibited by the constitution, and which would have been legally binding had not these statutes been made."

This decision is but a reiteration of the principle announced in the *Dartmouth College case*, and was followed and approved in *Weil* v. *The State*, 46 O. S., p. 450. The Court in that case, p. 452, said:

"Does the statute impair the obligation of contracts? It does not in terms purport to operate retroactively, or apply to contracts entered into before its enactment, but only to those made after it took effect. The obligation of a contract, is the duty, which the law at the time of making it, imposes upon the parties. As was said by Mr. Justice WASHINGTON in *Ogden* v. *Saunders*, 12 Wheat., 213, 'the law of the contract forms its obligation.' Judge COOLEY, in his work on Constitutional Limitations, p. 346, says: 'The obligation of a contract depends on the laws in existence when it was made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation, to perform them by the one party, and the right acquired by the other.' In an interesting discussion of this subject in *Smith* v. *Parsons*, 1st Ohio, 236, it is said by BURNETT, J., in the opinion of the Court, that, 'The Legislature has a right, by law, to regulate contracts, to determine their effect, and point out the mode of their discharge. These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract, in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continues what it was at its commencement; and it is more cor-

rect to say that the law has in part made the contract, than it has changed it.' Persons contracting after the passage of the statute, could not know the law as one impairing the obligation of contracts in the sense of the constitution, but as an act regulating future contracts, and defining their effect. The learned judge further says: 'Instead of determining the validity of the statute by reference to the alleged intention of the parties to the contract, we must fix the legal intent of the parties, as well as the nature and extent of the obligation of the contract, by reference to the statute.' And, again, 'Contracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in a law, as if that provision had been inserted in, and formed part of the contract.'"

If the authority of these cases be correct, the Legislature, having full and ample power to legislate concerning contracts subsequently made, to regulate the mode and manner of their making, and of their enforcement, has full and ample power to regulate and control and prescribe the manner and method of making and enforcing building contracts, and to fix such regulations regarding them, and to provide such security for those engaging therein, as it may see fit.

These decisions were not upon the subject of Mechanic's Liens, nor did they specifically construe building contracts; but as there is no difference in the eye of the law between building contracts and other contracts, the judicial determination that the power to regulate one class is constitutional, so long as it stands, controls and determines the power to regulate the other class, and *Smith* v. *Parsons* and *Weil* v. *The State*, in effect, decide that legislative power over the subject of mechanic's liens or building contracts is absolute and constitutional, and the decision is as binding as if they had had the exact question before them. But in addition to these cases there had been, before the decision relied upon by respondents, two decisions of the Supreme Court of Ohio, upon the subject of mechanic's liens, and prior to

the contract set out in the complaint, which were directly in conflict with the rule announced in *Young* v. *The Lion Hardware Company.*

In *Railway* v. *Cronin*, 38 Ohio State, 122, and in *Railway* v. *McCoy*, 42 Ohio State, 251, the Supreme Court enforced liens under the Act of March 31, 1874, 71 Ohio Laws, 51. That act was, in principle and effect, as applied to railway companies, a counterpart of Section 3184 as amended. It provided that the railway company, regardless of any contractual relations it might have with laborers or employes of subcontractors, should pay each person performing labor or furnishing material under a contract, express or implied, with the original contractor or any subcontractor; providing, further, for notice equivalent to that prescribed in Section 3184. The intention of the two statutes is identical, to-wit., to protect the laborer or the material man, or the subcontractor, and to secure him the amount due for his labor or material.

In the case of the railway company the contract is specific, that such laborer or material man shall be paid. In cases arising under Section 3184 the provision is, that he shall have a lien if not paid. In neither case is there any pretense or intention that his payment shall be contingent on any amount remaining due the principal contractor. The Act of March 31, 1874, gives notice to the railway company to look out for the payment of the laborers and subcontractors, and that if payment be made to the principal contractor, without so taking care of them, it will be at its peril. Section 3184 gives notice to the owner of the building that he must likewise look out that the laborers and subcontractors and material men are paid, or he will be at the peril of a lien on his property.

It will be claimed, doubtless, that the cases referred to, construing the Act of March 31, 1874, did not bring directly in controversy the constitutionality of the act. The Court is

not presumed to enforce an unconstitutional act, and its decision in these cases enforcing liens was a distinct affirmance of the validity and constitutionality of the legislation.

In view of these decisions, if there were no other reason, this Court, in this case, not only is not bound by the decision in *Young* v. *The Lion Hardware Company*, but under the rule should follow the principle of the prior decisions, and in so far as these respondents are concerned, enforce their lien, leaving the case of *Young* v. *The Lion Hardware Company* to be a rule for cases governing contracts arising subsequently thereto.

The Question is one of General Jurisprudence and Commercial Law.

The question of the constitutionality of mechanic's liens is not, within the meaning of the cases holding state decisions upon local statutes final, a question of purely local or state law, but is rather a question of general jurisprudence, involves public policy, relates to the unrestricted powers of the legislature, and is in a sense a question of general commercial law, and as such should be considered by the United States Court independently of, and without reference to the state decisions, except in so far as the state decision may be entitled to weight by virtue of its reason. The Court in its decision in the Lion Hardware Company case, did not find that the acts in controversy violated any of the express provisions of the state constitution, nor is there any pretense that it violates any of such express provisions. The only ground of the decision was, that the act in some way violated the general and indefinite provisions of the Bill of Rights, and exceeded what was known as the general and unrestricted powers of the legislature. The question falls directly within the scope of the decision of Justice STRONG in *Olcott* v. *The Supervisors*, 16 Wallace, p. 678.

The Court on page 690 says:

> "This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power, or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other state as it has to the state of Wisconsin. Its solution must be sought not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state court can conclusively determine for us."

As in that case, it is not here claimed, and cannot be claimed that the Legislature has no power to legislate upon the subject of mechanic's liens. It is not claimed that it cannot control and prescribe the rules governing such liens. It was only claimed by the Court that in the particular statute the Legislature had exceeded its powers as to one of these rules or conditions.

The decision of the Court was upon a part of the constitution common to all constitutions, and was not a construction of any local or special part of the constitution. Its decision had reference as much to the constitution of one State as to another State, and attempted to prescribe a rule of general constitutional construction which might be applicable to any other State, or even to the constitution of the United States, as to the State of Ohio. This is a question of general jurisprudence, and this Court must decide it independently. While it is true that mechanic's liens are in their nature statutory and governed by State laws, yet being a part of the statute law of every State and Territory and recognized by Congress as a part of the statute law of the District of Columbia, and in the language of Justice

BRADLEY in 113 U. S., p. 516, "Standing on the basis of natural justice," the law governing them may be considered in the same light as those governing and regulating general commercial law, and, therefore, in cases of proper jurisdiction, the subject of the independent construction of the Federal Courts, regardless of local decision. Local decisions can only be binding in cases of construction of particular local statutes, or in cases of invasion of some specific provision of local constitutions. No such decision can be binding, where it affects or construes only the general powers of the Legislature over the subject.

This view contended for in the argument and brief of respondent in the lower Courts was sustained by the Court of Appeals in its opinion delivered by His Honor, Judge LURTON, see Record, p. 49:

> "With every disposition to come to an agreement with the views of the Supreme Court of Ohio, in the interest of harmony of decisions, we are, nevertheless, compelled to express our inability to assent to the conclusions of that learned and impartial tribunal as to the validity of the legislation under which complainants' rights are claimed. *The decision of that Court was not placed upon any merely local or peculiar provision of the Constitution of Ohio. The ground upon which they placed their objection to the law was, that it was an unreasonable and oppressive restraint upon the owner's liberty of contract.*"

And Record, p. 51:

> "We have made these copious extracts from the opinion for the purpose of indicating that the case did not turn upon any constitutional principle peculiar to Ohio. The 'rights' supposed to be violated are rights deemed fundamental under the terms of popular and constitutional government, and like declarations are to be found in all or most of our State constitutions. *The question is, therefore, one of general law, having as much reference to the constitution of any other State as to that of Ohio.*"

II.

Said Section as Amended, Does Not Deprive the Owner of Property of the Right of Possessing and Protecting the Same.

III.

It Does Not Deprive the Owner of Property of the Same Without Due Process of Law.

IV.

It Does Not Impair Obligation of Contracts.

The lien sought to be enforced in the case at issue was for materials furnished in and about the construction of a building commenced after the passage of the act of April, 1894, and all contracts and agreements set out in complainant's Bill were made and entered into after the passage of that act.

The contract having been made during the existence of the statute, it must, therefore, be considered as forming a part of the contract, and does not impair the obligations of that contract nor deprive petitioner of its property without due process of law. The rule that all contracts are subject to the conditions and obligations imposed by existing laws is too well settled to be controverted. It has been the established law ever since the Dartmouth College case, in 4th Wheaton. *Parsons* v. *The State*, 1st Ohio Reports, 236, and *Weil* v. *The State*, 46 Ohio State, 450, both referred to above, thoroughly discuss this question and establish the rule in Ohio.

> "The obligation of a contract," it is said, "consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other."
>
> Cooley on Constitutional Limitations, 6th Edition, 344.

"The power of the legislature, as to all future transactions, to regulate and control contracts by prescribing the manner in which they shall be made * * * * by declaring what future voluntary acts of parties in relation to a particular subject-matter shall be deemed a contract, and, if it pleases, by creating implications from such acts from which certain declared obligations shall flow, cannot be denied or doubted."

Steubel v. *Mil. & Miss. R. R.*, 12 Wis. 67.

"No reason has been suggested why the legislature could not exempt all interests in landed estate from execution and sale under judgments against the owner, and perhaps all his personal property. However this may be, it is very certain that the established construction of the constitution of the United States against impairing the obligation of contracts requires that statutes of this class shall be construed to be parts of all contracts made when they are in existence, and, therefore, cannot be held to impair their obligation."

Justice MILLER in *Denny* v. *Bennett*, 128 U. S. 495.

"What may be the effect of those statutes in this regard upon mortgages which were created prior to the statute of 1852, it is unnecessary at present to inquire. The mortgages of the complainant were not created prior to the statute, but long subsequent thereto. When the complainant took his mortgage, it knew what the law was; it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction. The cases referred to by counsel to the contrary, holding void a consent exacted contrary to the constitution, have no bearing upon the present cases."

Provident Institution v. *Jersey City*, 113 U. S. Reports, 514.

"The inhibition of the constitution is wholly prospective. The State may legislate as to contracts thereafter made as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effects."

Edwards v. *Kearsey*, 98 U. S., 595.

Applying this rule to mechanic's liens, Phillips on Mechanic's Liens, Sec. 30, says:

"Power as to Future Contracts.—As to future contracts, there is no doubt the Legislature may make such regulations affecting the right of lien between the parties, and priorities of third persons, that shall be deemed advisable. Thus, an act may be passed to take effect in the future, subordinating even prior judgment and mortgage liens to subsequent mechanic's liens, but such liens as have accrued prior to the passage of the act cannot be thus affected. Neither can the lien be extended so as to impair the obligation of contracts or liens of duly recorded incumbrances antecedent to the act. If enacted by prior statute, mechanic's liens may be made liens on all the property possessed by the debtor. On the other hand, the Legislature has the right to prefer any other lien over those of mechanics; and where it declares a widow's lien shall be preferred, excepting those of vendors for purchase money or real estate, the rule of *expressio unius alterius* prevails, and mechanic's liens will be subordinated to the widow's right. Indeed, there is no provision of the constitution which precludes the Legislature from declaring a statutory lien, in respect to future contracts, in favor either of the contractor or the laborer, upon the land of the owner, at whose instance and for whose benefit the services are performed. Every contract is presumed to be executed with reference to existing laws, and subject to such modification, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection."

"The constitutional validity of such statutes securing to subcontractors, and others furnishing labor or material for a contractor, irrespective of the state of account between the owner and the contractors, is well established; and it is established upon the ground that such

statutes annex the lien as an incident to the contract to the owner with the contractor, such contract being the evidence of the authority of the contractor to charge the owner's property with liabilities incurred by him in performing his contracts."

Jones on Liens, Vol. 2, p. 286.

"Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being that the parties are supposed to contract on the basis that if the stipulated labor is performed or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives the re-required notice within the specified time."

McMurray et al. v. *Brown*, 91 U. S. Reports, p. 266.

The contract then, following the language of *Smith* v. *Parsons*, having received the impress from the law, and being co-existent with it, and, therefore, not being injured or impaired by the law, the owner of the building against whom the lien or contract is sought to be enforced, cannot be said to be deprived of his property without due process of law. Ample means are given him to avoid any injurious consequences arising out of the law. He can be his own builder. He has his remedy by suit against the contractors in case he has to pay for material or labor not paid for by the contractor. He can demand a bond and protect himself against the laches of an irresponsible contractor. He can arrange his payments so that the time limited by the statute for the filing of a lien shall have expired before the payments are made. He can see himself to the application of payments when made, and to the claims of subcontractors, material-men or laborers. There is no necessity for any prudent man being injured, in any way, by the provisions of the existing statutes. If he is injured, it is only because he has failed to take the necessary precautions due from every

person entering into contracts of any sort with another. The law affords him ample remedies, and if he fails to take advantage of them, it is his own fault.

In considering this branch of the case, His Honor, Judge LURTON (see Record, p. 64), said:

> "If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law,"

and cites in support of this—

Edwards v. *Kearsey*, 96 U. S., 595.
Greenwood v. *Freight Co.*, 105 U. S., 13.
Denny v. *Bennett*, 128 U. S., 489.
Smith v. *Parsons*, 1 Ohio, 236.
Weil v. *The State*, 46 O. S., 450.

And on the same page of the Record he further says:

> "Neither can the owner, be said, to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law."

The said Section does not Deny to Certain Classes, To-wit, Owners of Buildings or Other Structures Described Therein, the Equal Protection and Benefit of the Law as Guaranteed by Article 1, Section 2, of the Constitution of the United States, and by the Constitution of Ohio and is not in controvention of any provision of either the Constitution of the United States or of the State of Ohio.

It is claimed by counsel that the whole subject of mechanic's liens comes within the limits of so-called class legislation, and is, therefore, inhibited by the guaranty of equal protection and benefit to all people. So far as we

have been able to find, there are but two adjudicated cases in which the power of the legislature to pass any mechanic's lien law, has been questioned upon this ground.

"The lien given to mechanics on the land upon which they have erected a building, the lien of the landlord upon the growing crop of his tenant, the exemption of certain articles from legal process in favor of heads of families, and of a portion of his earnings in favor of the laborer are instances of such legislation about the constitutionality of which there has never been any doubt."

Davis v. *The State*, 3 Lea. (Tenn.), 380.

"Nor is the grant of this remedy by motion in violation of Sec. 8, Art. 2, of the Constitution, which forbids partial or class legislation. Every citizen in the State may bring himself within its operation by contracting for the erection of a house, which most men do, in the course of a life-time."

"Whether a given law may be extended to any member of the community who may be able to bring himself within its provisions is the correct criterion by which the Courts are to determine its validity or invalidity under that section of the constitution."

12 Heisk, 633;
14 Lea, 520;
16 Lea, 71;
86 Tenn., 272;
3 Lea, 380;
87 Tenn., 214;
10 S. W. R., 353.

"After very careful consideration of all the sections of the act, we have no hesitancy in holding them to be constitutional and valid."

Cole Manufacturing Co. vs. *Falls*, 90 Tenn., 471.

That legislation of this character is not such as is prohibited for the reason that it confers unequal benefits, or imposes unequal burdens, and is not class legislation, seems to us beyond controversy. It is confined to no particular class, nor to any particular calling, but applies to all alike,

who are erecting or who may erect buildings or other structures mentioned in the act, and to all who contribute anything of any nature be it either in work or materials, to the erection of such building or structure.

> "Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors, or married women, bankers or traders, and the like. The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or on the other hand, to a subdivision of the State, to a single class of citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislators may, therefore, prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid. The discriminations are made constantly, and the fact that the laws are of a local or special operation only, is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a special lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge."
>
> Cooley's Constitutional Limitations, p. 482.

"The special regulations for one kind of business which may be necessary for the protection of the public, can never be the just ground of complaint, because like restrictions are not imposed upon another business of a different kind. The discriminations which are open to objections are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions; it is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law."

Hing vs. *Crowly*, 113 U. S., 708.

"The fourteenth amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs and enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessity of society, legislation of a special character having these objects in view,

must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fire, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just grounds of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it effects alike all persons similarly situated, is not within the amendment."

Barbier v. *Connolly*, 113 U. S., 31.

It is true that the Court in that case was construing so-called police powers. But the "police power" is a broad and comprehensive term. It is "broad and plenary as the taxing power (as defined in *Coe* v. *Errol*, 116 U. S.,517), and property within the State is subject to the operation of the former, so long as it is within the regulating restrictions of the latter."

Kidd v. *Pearson*, 128 U. S., 1.

It covers all things which tend to conserve and promote the public health, welfare and convenience, and certainly the erection of buildings come within the scope of such powers. The universal occupation of mankind is, out of the products of the earth, to add to it again, in the shape of buildings, or other structures contemplated by the statute. The lien provided is upon all conceivable human constructed objects attached to the earth or upon or in the water. No possible subject is more appropriately within the "police power," nor more necessary to the welfare of society.

See—

Lehman v. *McBride*, 15 O. S., 473;
City of Cincinnati v. *Caroline Steinkamp*, Weekly Law Bulletin, Vol. 35, p. 185;
Kelly v. *The State*, 6 O. S., 269;
McGill v. *State*, 40 O. S., 328;
State v. *Powers*, 38 O. S., 54.

> "And by the equal protection of the laws is meant equal security under them to every one on similar terms, in his life, his liberty, his property, and in the pursuit of happiness."

Railroad Tax Cases, 13 Fed. Reporter, 722;
County of Santa Clara v. *S. P. R. R.*, 18 Fed. Rep., 385.

There are upon the statute books of Ohio many laws which apply only to certain classes, the constitutionality of which has never been doubted. The exemption of the homestead, or of a sum in lieu thereof in favor of the head of the family; the exemption of a portion of wages and of certain goods and chattels from execution, apply only to a portion of the citizens, but the power of the legislature to enact such a law has never been questioned.

The law regulating the rate of interest is another law of the same class. But the Supreme Court of Ohio seems to have no doubt of the constitutionality of such an act, for in *Smith* v. *Parsons* it says:

> "It is admitted that the States have not given up the entire power of legislating on the subject of contracts. They may, for instance, pass laws preventing usury, and fixing the interest of money."

Applying the rule of *Barbier* v. *Connolly*, 113 U. S., 32, the mechanic's lien operates alike upon all persons and property under the same circumstances and conditions. It affects alike all persons similarly situated, and is not obnoxious to the constitution of either Ohio or of the United States.

The common law gave to the warehouseman and wharfinger a lien on the goods deposited with him for his labor; to the innkeeper upon the effects of his guest for food and lodging, recognizing the natural necessity and justice of imposing upon and imparting to such contracts burdens not agreed upon specifically by the contracting parties.

Arising out of and suggested by such common lien law upon personal property has grown the legislation under consideration. Possession of the real estate cannot be held by the laborer or mechanic until his claim be paid, therefore out of necessity the law has protected him.

> "Its principles are believed to be founded on natural justice and equity, in that he who shall have enhanced the value of the real estate by his labor, or by the materials supplied in its erection, shall have a preferred claim on the property to secure the payment of such labor and materials."
>
> Overton on Liens, 533.

Decisions in Other States Holding Mechanic's Lien Statutes, Similar to that of Ohio, to be Constitutional.

Legislation of the sort complained of, is neither new to the statute books, nor to the courts of last resort in the various States. In nearly all of the States of the Union identical or similar statutes, under similar constitutions are, and have been, in force for many years.

The Supreme Courts of over twenty States have passed upon them. Every question raised as to the constitutionality of the act has been repeatedly adjudicated previous to the Ohio decision, and with two exceptions, viz.: The Supreme Court of Michigan in *Sprey* v. *Sault St. Marie Savings Bank*, 77 Michigan, 199, and the Supreme Court of Pennsylvania, in *Waters* v. *Wolf*, 162 Pa. State, 153, all courts of last resort, have held the legislation constitutional, neither in violation of the obligations of contracts, nor a seizure of property without due process of law.

In New York the constitutionality of an act like the Ohio act was twice raised, and both times the act held to be constitutional. The New York Statute is as follows:

"Section 1. Any person or persons, firm or firms, corporation or association, who shall hereafter perform any labor or services or furnish any materials which have been used or which are to be used in erecting, altering, or repairing any house, wharf, pier, bulk-head, bridge, building or appurtenance to any house, building, and building lot, including the fences, sidewalks, paving, fountains, fish-ponds, fruit and ornamental trees, or who shall hereafter perform any labor or services, or furnish any materials which have been used or which are to be used in improving, or equipping any house, building, or appurtenance with chandeliers, brackets, or other fixtures, or apparatus for supplying gas or electric light with the consent of the owner as hereinafter defined, or his agent, or any contractor, or sub-contractor, or any other person contracting with such owner to erect, alter, repair, improve or equip as aforesaid, within any of the cities or counties of this State, may, upon filing the notice of lien prescribed in the fourth Section of this Act for a lien, for the principal and interest of the price and value of such labor and material, upon such wharf, house, pier, bulk-head, bridge, building or appurtenance, as upon the lot, premises, parcel or farm of land, upon which the same may stand or be intended to stand to the extent of the right, title, and interest at that time existing of such owner, whether owner in fee of the estate, or whether a lessee for a term of years, or vendee in possession under a contract existing at the time of filing of such notice of lien, or of the owner of any right, title or interest in such estate which may be sold under an execution under general provisions of the statute in force in this State relating to liens of judgment and forcement thereof, etc., but in no case shall such owner be liable to pay by reason of all the liens filed pursuant to this Act, a greater sum than the price stipulated and agreed to be paid in such contract and remaining unpaid at the time of filing such lien; or in case there is no contract then the amount of the value of such labor and material then remaining unpaid."

In discussing the constitutionality of this Section the New York Supreme Court in *Blauvelt* v. *Woodworth*, 31 N. Y., 285, said:

> "It is insisted that if this be the act, it is unconstitutional and void, as it may enable the claimant to reach the property of a third party without due process of law. There is no provision in the constitution which precludes the legislature from declaring a statutory lien in respect to future contracts in favor either of the contractor, subcontractor or the laborer, upon the land of the owner, at whose instance, and for whose benefit the services are performed.
>
> "The act of 1852 was in force when the contract in question was made; and every contract is presumed to be executed with reference to existing laws, and subject to such mod fications, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection."

The question of the constitutionality of this Section was again raised in the case of *Glacius* v. *Black*, 67 N. Y., 567. In its opinion rendered in that case the Supreme Court of New York said:

> "There is no constitutional objection to the creation by the legislature of statutory liens in favor of mechanics and others, for the purposes, and under the circumstances and limitations specified in the statutes known as the Mechanic's Lien Laws."

By the Court:

> "The constitutionality of the legislation known as mechanic's lien laws, was affirmed in *Blauvelt* v. *Woodworth*, 31 N. Y., 285, and the Court held there was no constitutional objection to the creation by the legislature of statutory liens in favor of mechanics and others for the purpose and under the circumstances and limitations specified in those statutes.
>
> "Laws of similar character have been in force in this State for more than forty years (Laws of 1844, Ch. 220), and similar legislation is found on the statute books of many of the States. These statutes have been frequently under consideration by the Courts, and so far as

we have known, their constitutional validity has never been judicially questioned.

"We do not doubt the soundness of *Blauvelt* v. *Woodworth*, and if the question admitted of doubt, we should not feel at liberty under the circumstances to reconsider the decision in that case."

In the case of *Gunney et al.* v. *Walsham*, 16 R. I., 698, the constitutionality of an act similar to the act of Ohio was affirmed, and in its opinion the Supreme Court of Rhode Island said:

"Chapter 696 is not unconstitutional as regards an owner of an estate who makes a contract for the erection of a building thereon after the laws went into effect, though at the time the material-man recorded his lien the contractor had been paid in full.

"We do not think that said chapter can be held to be unconstitutional, as regards the defendant, because it impairs the obligation of contracts. The chapter was passed and went into effect before the defendant's contract in May, was entered into, and, therefore, said contract must be held to have been entered into subject to its provisions."

Section 1183 of the California Statutes providing for a lien for mechanics, material-men, contractors, and subcontractors, etc., is a law similar to the Ohio Statute. In the case of *Hicks* vs. *Murray*, 43 Cal., 514, the constitutionality of the act was affirmed. In its opinion, the Supreme Court of California said:

"The mechanics' lien law of 1868 is not open to objection that it is unconstitutional on the ground that it attempts to appoint agents for private persons, nor that it confiscates property, nor as to the notice required of owners as to the responsibility for improvements, nor that it attempts to take away vested rights or clothe private persons with power to divest citizens of their property."

In *Atwood* vs. *Williams*, 40 Me., 409, the Court held, under a similar statute, that the material-men and laborers might enforce their claims as against the owner even though the contractor, under and for whom they worked, had been paid in full.

The Maine Statute there construed was as follows:

> Chapter 125, Sec. 35: "Any ship carpenter, caulker, blacksmith, joiner or other person, who shall perform labor or furnish materials, for or on the account of any vessel, building or standing on the stocks, or under repairs after having been launched, shall have a lien on such vessel for his wages, or materials, until four days after such vessel is launched, or such repairs afterwards have been completed, and may secure the same by an attachment on said vessel within that period, which shall have precedence of all other attachments.
>
> Sec. 37: "Any person who shall perform labor or furnish materials for erecting, altering, or repairing any house, or other building, or appurtenances, or furnish labor or materials for the above purposes by virtue of any contract with the owner thereof, or other person who had contracted with such owner, shall have a lien to secure the payment of the same, upon such house, or building, and the lot of land on which the same stands, and upon the right of redeeming the same when under mortgage, and such lien shall continue in force for the space of ninety (90) days from the time when such payment becomes due."
>
> See also, *Spoffard* vs. *True*, 33 Me., 283.
> *Taggart* vs. *Buckmore*, 42 Me., 77.

To the same effect is *Taylor* vs. *Murphy*, 148 Pa. State, p. 337, although this is one of the cases relied upon by the petitioner. The Court there say:

> "It is no defense to such lien that the aggregate amount out of the liens entered against the building, together with the costs of building the same, exceed the contract price, if the materials furnished are of the quantity and quality needed for its construction."
>
> "As soon as owners of lots cease to be their own builders, they put it in the power of persons employed

by them to occasion losses to mechanics and materialmen which they ought not to bear, and it was to remedy this mischief that the legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just, but a convenient one."

Wheeler vs. *Miller*, 18 Pa. State, 52.

Section 6229 of the Revised Statutes of Minnesota provides as follows:

"All persons who have performed labor, or furnished skill, material or machinery for the construction, alteration or repair of any boat, vessel or other water craft, or for the erection, alteration, repair or removal of any house, mill, manufactory or other building, or appurtenance, or any fixture, fence, wharf or other structure, by virtue of a contract with, or at the instance of, the owner thereof, or his agent, trustee, contractor or subcontractor, shall have a lien to secure the contract price or value of the same upon such boat, vessel or other water craft, and upon such house, mill, manufactory or other building, or appurtenance, or fixture, bridge, wharf, fence or other structure, and upon the right, title and interest of the owner thereof, and in and to the lands upon which the same is situate, or to which it may be removed, not exceeding forty acres. If without the corporate limits of any city or incorporated village, and if situated upon or removed to lands within the corporate limits in such city or incorporated village, then, in and to the lot of land upon which the same is situate or to which it may be removed, not exceeding one acre in extent."

This statute was held to be constitutional in the cases of

O'Neil v. *St. Olaf's School*, 26 Minn., 329.

Bohn v. *McCarthy*, 29 Minn., 23.

Laird v. *Noonan*, 32 Minn., 358.

In the last named case the Supreme Court of Minnesota in its opinion said:

"As such liens are encumbrances upon the owner's title, they can only be created by his consent or authority;

and it is upon this ground that such legislation is supported. The statute annexes the lien as an incident to the contract of the owner with the contractor or builder, and such contract is the evidence of the authority of the latter to charge the building and land with liabilities incurred by him in performing his contract. The owner consents to this power conclusively and irrevocably, so far as others than the builder are concerned, by making a contract while such is the law."

"As respects the amount which may thus be secured, their rights are not dependent upon or limited by the amount due the contractor from the owner under the original contract, nor by the state of the accounts between them. It is sufficient that the liens are created through the owner's contract, from which his consent is implied. To avoid the encumbrance of such liens the owner takes the burden of securing the bond which he is authorized by the act to take. Whether the burden of taking such proceedings for his own protection should thus be cast on him, or whether subcontractors and laborers should be left to proceed against the amount due, as under the former practice, was entirely a question of legislative policy. And this is sufficient to dispose of the objection that the law unreasonably limits the exercise of the owner's discretion as to the person whom he shall contract with; that is to say, to such as can give bonds or are financially responsible for the contracts they may make in the prosecution of the work. It is strictly in conformity with the policy which allows a lien in any case. It does not take away or affect the rights of the owner any further than it may be necessary for the security of those who are presumed to have added something to the owner's property equal to the expenses incurred."

Spoffard v. *True*, 33 Me., 283.

Taggart v. *Buckmore*, 42 Me., 77.

"It is ordinarily understood, from the nature of the case, that under building contracts the work is not to be done wholly by the contractor; and it is a sound and just principle that all those who have, by consent of the owner, or in pursuance of contracts with him for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services have been discharged."

In Tennessee just such an act as the act herein complained of was upheld, though most vigorously assailed, as beyond legislative power. One of the most recent and thoroughly considered cases upon the subject is that of *Cole Manufacturing Company* v. *Falls*, 90 Tenn., 471:

"1. Act Tenn. 1889, Ch. 103, which provides that every person who is employed by the contractors to furnish materials for a building shall have a lien on the building for the same, provided that within thirty (30) days after the building is completed, he shall notify the owner that he claims a lien, is not unconstitutional in that it allows the taking of property without due process of law."

By the Court:

"The lien given by act of 1845 has been endorsed by this Court, in many cases, without the expression of even a doubt as to the constitutionality of the enactment; and there is as little room for doubt with respect to the validity of the amendatory act of 1881. The corresponding provision of the act of 1889 is assailed upon the presumption—

"(1.) That it undertakes to appropriate the property of the owner for the benefit of a person with whom he had made no contract.

"(2.) That this result may be accomplished, though the owner has no notice of the claim until after he has paid the original contractor in full, and,

"(3.) That the aggregate of the claims of subcontractors and material-men may exceed the amount agreed to be paid the original contractor, in which case the owner may be compelled to pay more than the contract price for the advantages received. The provisions are not fairly subject to all these animadversions, and such of them as are well made do not render it obnoxious to the constitution. It is true that a lien is provided for persons with whom the owner is supposed to have no direct contractual relations, but that fact alone does not invalidate the act, for the owner must be held to have a knowledge of the existing law on the subject, and to the presumption that he employed the original contractor and gave out his work in reference to that

law. The right of lien to subcontractors and material-men is, by operation of law, incorporated into and made part of the owner's contract, as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor. The law declares that a lien shall exist in favor of the subcontractor and material-men in certain contingencies, hence the owner who makes the contemplated contract cannot justly complain of the legal result; especially when he receives the benefit of the labor and material of those for whom the lien is provided and who often have no other means of compensation. The enforcement of this law does not necessarily result in loss to the owner, nor take from him something for nothing.

"We find no valid constitutional objection to the first section of the present act. It does not provide for or allow the taking of property without due process of law or the law of the lands, and hence is not in violation either of Section 1 of the 14th amendment of the Constitution of the United States, or of Section 8, of Article 1, of the Constitution of Tennessee. Statutes similar to the provision made in the first section of our act of 1889 have been upheld and approved by the Supreme Court of the United States, and by the Courts of last resort in most of the States of the Union. In a very small minority of the States has the validity of such legislation been denied by the Courts."

See also *Reeves* v. *Henderson*, 90 Tenn., 521.

"The act of the legislative assembly, appr. January 12, 1872, (Code Ch. 40), secures liens to mechanics for their labor, and confers upon the District Court chancery jurisdiction to determine the rights and priorities of the liens of mechanics and mortgagees.

"The sixth section of the organic act of the territory provides: 'That the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and provisions of this act.' Held, that said act of the legislative assembly is constitutional, and also that said act secures a lien to a mechanic for work which has not been performed under any contract."

2 Montana, 115.

Sections 3018 and 3020 of the Connecticut statutes provides:

"Section 3018: Every building in the construction or repair of which or of any of its appurtenances, any person shall have a claim for materials furnished, or services rendered, exceeding $25.00 in amount, by virtue of an agreement with or by consent of the owner of the land on which such building is erected, or such persons have authority over the original acting for such owner in procuring such labor or materials shall, with the land on which the same may stand, be subject to the payment of such claim, and said claim shall be a lien on such land, building or appurtenances, and shall take precedence of any other encumbrance originating after the commencement of such service, or the furnishing of such materials."

"Section 3020: No person other than the original contractor for a building, or a sub-contractor whose contract with the original contractor is in writing, and has been assented to in writing by either party to such original contract, shall be entitled to claim any such lien unless he shall, within sixty days from the time he shall have commenced to furnish materials, or rendered services, give written notice to the owner of such building that he has so commenced to furnish materials or rendered services, and intends to claim a lien therefor on said building. No sub-contractor with or without a written contract complying with the provisions of this Section shall be required to obtain an agreement or consent of the owner of the land as provided in Section 3018 to enable him to claim a lien under this Section."

Construing this Act, the Court say:

"To apply and enforce the statute in a case like this works no injustice. Every owner of real estate knows the law. When he employs an agent to construct or repair a building, he knows the liability he incurs under the lien law, and may easily protect himself, and it is not unreasonable to require him to do so; while it would be hardship to require mechanics, when the owner is unknown, to know the terms of the agency, and to ascertain the nature and extent of the private instructions to the agent. We conclude, therefore, that the peculiar principles of the law of agency, which relate to

undisclosed principals, must yield to the provisions of the statute."

Paine v. *Tillinghast*, 52 Conn., 532.

"The law is remedial in its character, and is intended to secure the parties entitled to its benefits for their work and material, provided they employ the means, and adopt the rules fixed by the law to obtain and secure their rights."

Overton on Liens, 532.

"Sec. 3313, Rev. Stat., as amended by chapter 33, laws of 1889, (giving sub-contractors a lien for the amount of their claims for labor performed or materials furnished in or about a bnilding without regard to the contract price of the building, or the sum due from the owner to the principal contractor, but providing that the principal contractor shall defend any suit to enforce such lien, and giving the owner a remedy over against him is a valid law."

Mallory v. *La Crosse Abbatoir Co.*, 80, Wis., 170.

"The power of a Legislature as to all future transactions to regulate and control contracts, by prescribing the manner in which they shall be made, by declaring what future voluntary acts of parties in relation to a particular subject-matter shall be deemed a contract, and, if it pleases, by creating implications from which certain declared obligations shall flow, cannot be denied or doubted."

Mallory v. *La Crosse Abbatoir Co.*, 80 Wis., 177.

"The right to enforce a mechanic's lien against the property of the owner in the case of materials furnished his contractor, is not founded upon privity of his contract with the owner, but rests solely upon statutory law. The lien attaches upon delivery of the material, and upon compliance on the part of the material men with the provisions of the law, and this, too, irrespective of a contract, either express or implied, on the part of the owner.

"The right of the material man to his lien does not depend on, nor is it in any manner affected by the question whether the owner has or has not money in his hands due the builder, nor whether the former has performed his part of the contract to the letter."

Treusch, et al., vs. *Shyrock, et al,*, 51 Md., 162.

The validity of an act similar to the act herein complained of was sustained by the Supreme Court of Indiana in the case of *Colter* v. *Frese*, 45 Ind., 96.

The same question was also considered by the Indiana Court in the case of *Andis* v. *Davis*, 63 Ind., 17–20. In that case the Court says:

> "In this case the owner had fully paid the contractor before notice was filed, and the Court say that the facts alleged in that part of the answer were not sufficient to constitute a defense to appellee's action by his compliance with the requirements of the statute, and appellee had acquired a valid lien upon the appellant's house and real estate for the amount due the appellee for work done by him in the creation of said house. It is well settled by the decisions of this Court that the appellee's lien was not defeated by the alleged payment by the appellant to Norford of the full amount due or to become due to him on account of the erection of said house."

In the case of *Smith, et al.* v. *Newbaur*, ~~114~~ 144 Ind. Reports, 95, the first two sections of the syllabus are as follows:

> "Constitutional Law. Due Process of Law. Mechanic's Lien. Statute Construed. Section 7257, R. S., 1894, providing that a mechanic's lien may be acquired by filing in the recorder's office a notice of intention to hold the lien, within sixty days after performing labor or furnishing material, is not unconstitutional as depriving the owner of his property without due process of law.
>
> "Mechanic's Lien. For Materials Furnished to Contractor or Subcontractor. A lien may be acquired for materials furnished for a building to either a contractor or subcontractor, under Section 7255, R. S., 1894, placing them in the same category, so far as the right to acquire a lien is concerned."

The Court in its decision in this case says:

> "The action was brought under the provisions of the mechanic's lien law of 1883 (Acts 1883), 140, as amended by the act of 1889 (Acts 1889, 257) and by the act of 1891 (Acts 1891, 28), Section 7255, R. S., 1894 (Section tion 1688, Ell. Supp.), and following sections.

"In support of the demurrer to the complaint, it is first contended that the mechanic's lien law of this State is invalid, as repugnant to Section 1, Art. 14, of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property, without due process of law. This contention is based upon the provisions of Section 3 of the mechanic's lien law (Section 7557, R. S., 1894; Section 1690, Ell. Supp.), which provides that any person wishing to acquire such a lien upon any property shall file in the recorder's office, "at any time within sixty days after performing such labor or furnishing such materials,' notice of his intention to hold such lien.

"This notice, the only one provided for in the statute, is insufficient, say counsel, to secure that due process of law referred to by the Federal Constitution before the fixing of a lien upon the citizen's property. Under the law as enacted, counsel contend, any one may perform labor or furnish material in the construction of a building for a land owner, without such owner's knowledge or consent, and then secure a lien upon the land and building by notice filed after the work is done or materials furnished. It is said that the property owner should have notice at or before the doing of the work or the supplying of the materials, so that he may, if he wishes, prevent the doing of such work or the furnishing of such materials, and so keep his property free of the lien.

"It has often been held that every statute under which a contract is made enters into and forms a part of such contract. The appellants, in the contract for the erection of the dwelling house upon their property, are therefore chargeable with knowledge of, and are bound by, all of the provisions of our mechanic's lien law then in force. By the terms of the agreement entered into the contractors were to furnish all materials necessary for the construction of the building. This was notice that such materials were to be furnished, and the law under which the contract was made was further notice that the building and ground upon which it was to be erected would be liable to a lien for the value of the materials so furnished. The only uncertainty left was whether those who should furnish the material would claim the lien therefor. That uncertainty is provided for in the statute, which requires that the notice of intention to hold the lien be filed in the recorder's office within sixty

days. The owner has, consequently, ample means of protection, and is not liable to a lien without notice, nor to have his propertyt aken without due process of law.

"It is intimated that the law hampers the freedom of action of the property owner; that he may desire to pay the contractor in advance, or to pay him by an exchange of other property for the erection of the building; and that it may be an inconvenience, or induce the contractor to bid higher for the work, if payment is to be delayed for sixty days after the work is done. These, however, are considerations that should be addressed to the Legislature, and not to the Courts. Besides, it is to be remembered that without the right to a lien on the property, laborers and material men would, in many cases, have no security for their toil or the materials furnished by them. The laborer is worthy of his hire, and the seller of goods ought to be paid for them. As the law stands all parties are secured in their rights. The owner, by seeing that laborers and material men are paid, or by keeping back for sixty days from the contractor sufficient to make such payment, is in no danger of having to pay twice for his building; while at the same time the man whose labor or material has gone into the building can look to the building itself and to the ground upon which it stands for his security. The property owner enjoys the benefit of this work and of this material, and it is but just that he should be charged, for at least sixty days, with the responsibility of seeing that they are paid for."

On petition for rehearing the above case the decision was affirmed.

Code Wash. T., Sec. 1957, provides:

"That every person performing labor upon or furnishing material to be used in the construction of a building has a lien therefor, whether furnished at the the instance of the owner or his agent, and that for the purpose of the act, every contractor, etc., shall be held to be the owner's agent. By Sec. 1965 the owner may avoid a lien by posting a notice as therein directed.

"Held: That the material man or laborer has a lien, notwithstanding payment to the contractor."

1 Wash. Rep., 609.

"Notice and affidavit having been furnished as required by law, by subcontractor to owner, the latter is liable to former for amount named in the affidavit, regardless of state of accounts between owner and general contractor."

N. & W. Ry. Co. v. *Howison*, 81 Va., 125.

"That which is given for the preservation or betterment of the common pledge, is in natural equity fairly entitled to the first rank in the tableau of claims. Mechanic's lien laws stand on the same basis of natural justice. We are not prepared to say that a legislative act giving preference to such liens, over those already created by mortgage, judgment or attachment, would be repugnant to the Constitution of the United States."

Provident Institute v. *Jersey City*, 113 U. S., 516.

To the same effect see *Brooks* v. *Railway Company*, 101 U. S., 446.

An Act of the District of Columbia, identical in principle with the provisions of Sec. 3184, has been construed and enforced by the Supreme Court of the United States in *Winder* v. *Caldwell*, 14 Howard, p. 434. We quote from the opinion of the Court upon pages 444 and 445:

"The remaining bills of exception involve, in fact, but one prominent and important question, and the decision of it will dispose of this case:

"The right to file a 'mechanic's lien' as it is usually denominated, is claimed by the plaintiff under the Act of Congress of March 2nd, 1833, entitled 'An Act to secure to mechanics and others, payment for labor done and materials furnished in the erection of buildings in the District of Columbia.' The first section of this act, defines the persons who shall be entitled to this peculiar security and remedy, as follows:

"'All and every dwelling house, and other building, hereafter constructed and erected within the city of Washington, in the town of Alexandria, or in Georgetown, in the District of Columbia, shall be subject to the payment of the debts contracted for, or by reason of any work done, or materials found and provided by any brickmaker, bricklayer, stonecutter, mason, lime merchant, carpenter, painter and glazier, ironmaker, blacksmith, plasterer, and lumber merchant, or any other

person or persons employed in furnishing materials for, or in erecting or constructing such house or other building, before any other lien which originated subsequent to the commencement of such house, or other building. But if such dwelling house or other building, or any portion thereof, shall have been constructed under contract, or contracts, entered into by the owner thereof, or his or her agent, with any person or persons, no person who may have done work for such contractor or contractors, or furnished materials to him, or on his order or authority, shall have or possess any lien on said house or other building, for work done, or materials so furnished, unless the person or persons employed by such contractor to do work on, or furnish materials for, such building, shall within thirty days after being so employed, give notice in writing to the owner or owners of such building, or to his or to their agent, that he or they are so employed to work or to furnish materials, and that they claim the benefit of the lien granted by the act.'

"Does a master-builder, undertaker, or contractor who undertakes, by contract with the owner to erect a building, or some part or portion thereof, on certain terms, come within the letter or spirit of this act, or within any of the classes enumerated, as entitled to this special remedy? Such persons have an opportunity, and are capable of obtaining their own securities. They do not labor as mechanics, but superintend work done by others. They are not tradesmen in lumber, or other materials for building, but employ others to furnish materials. If such contractor should by accident, be a carpenter, or an owner or vendor of lumber, yet he deals not with the owner in this capacity, but as an undertaker, who has covenanted for his own securities.

"The title to this act shows its policy and intention. It is to secure to 'mechanics and others, payment for labor done and materials found;' and the persons enumerated in the first section are, plainly, those mechanics and tradesmen whose personal labor or property have been incorporated into the building, and not the agents, supervisors, undertaker or contractors, who employed them. The act contemplates two conditions, under which such labor and materials may have been furnished: First, on the order of the owner, who may act without

the intervention of any middleman, and thus become indebted directly to his mechanics and tradesmen. Or, secondly, when they have been furnished on the order of contractor or undertaker. In such cases, the mechanic or material-man, if he intends to look to the credit of the building, and not to that of the contractor with whom he deals, must give notice to the owner of the building, within thirty days, of his intention to claim this security. The contractor, though mentioned in the act, is not enumerated among those entitled to its benefit. The aim and policy of this act is also obvious. Experience has shown that mechanics and tradesmen, who furnish labor and materials for the construction of buildings, are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor of the mechanic and the materials are incorporated into them, the owner becomes insolvent, and sells the buildings or encumbers them with liens; and thus one portion of his creditors are paid at the expense of the labor and property of others. Or, the solvent owner, who builds by the agency of a contractor, or middleman, pays his price and receives his building without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is not to secure contractors, who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection to those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated."

The Circuit Court of the United States in *Puriton* vs. *The Hull of a New Ship*, 2nd Curtis, 416, has also construed and enforced upon the same ground, a statute of Maine quoted in said case, which contains the same provisions as Section 3184.

"That mechanic's lien laws are constitutional has been decided in a multitude of cases. They have been attacked as depriving persons of their property without due process of law, as being class legislation, as impairing the obligation of contracts, and as interfering with

the right of trial by jury, and they have been declared by the Courts to be free from all these objections."

* * * * * * * *

"But although these laws have in general been held constitutional, they sometimes contain unconstitutional provisions; so it will be necessary to examine the subject more in detail. The principal attack of these laws on constitutional grounds has been directed towards the provisions giving liens to subcontractors and materialmen in the second degree, it being argued that, as there is no privity of contract between them and the owner, it was depriving him of his property without due process of law, to subject it to a lien for the contractor's debts to them. It was probably in order to meet this objection that some of the acts are declaring that the contractor shall be deemed the agent of the owner, thus bringing the owner and the subcontractor into privity of contract. But even without this provision, the acts giving these persons liens are not unconstitutional, since, when the owner enters into contract with the contractor, he does so with conclusive knowledge of the law, and the provisions of the mechanic's lien law enter into and form a part of his contract. And it makes no difference that the statute allows subcontractors to have liens aggregating more than the entire contract price named in the original contract, or that it allows them a lien in certain cases, even though the owner has paid the contractor in full."

Boisot on Mechanic's Liens—Sec. 22-23.

Chapter 191, Public Statutes of Massachusetts, provides:

"Section 1: Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration and repair of a building or structure upon real estate by virtue of an agreement with or by consent of the owner of such building or structure, or of any person having authority over or rightfully acting for such owner in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situate, to secure the payment of the debts so due to him, and the costs which may arise in enforcing such lien, except as is hereinafter provided."

"Section 2: When the agreement mentioned in the preceding section is for labor performed or furnished, and for materials furnished upon an entire contract and for the entire price, a lien for the labor alone may be enforced, if it can be distinctly shown what such lien was worth, but in no case shall such lien be enforced for a sum greater than the price agreed upon for the entire contract."

Section 3: No lien shall attach for materials furnished unless the person furnishing the same before so doing gives notice in writing to the owner of the property to be affected by the lien, if such owner is not the purchaser of such material, that he intends to claim such lien."

"Section 4: The owner of a building or structure in the process of erection or of being altered or repaired, if he is the person other than the party by whom or in whose behalf the contract for labor and material has been made, may prevent the attaching of a lien for labor not at the time performed, or for materials not then furnished, by giving notice in writing to the person performing or furnishing such labor or furnishing such materials, that he will not be responsible therefor."

Under this Statute it has been held:

"It is no defense to a petition to enforce a mechanic's lien, under public Statute 191, for labor performed for a contractor upon the respondent's house, that the material furnished by the contractor was not of the quality called for by the contract and the petitioner's work, through no fault of his, was a damage to the house. * * * *

"Our statute gives an immediate lien to any one who has performed labor in the repair of a building by the consent of its owner. Even if he is employed by a contractor, the laborer's lien is not by way of subrogation, and does not depend upon the terms of the contract or the state of the account between his employer and the owner of the land."

Bowen v. *Phinney*, 162 Mass., 593.

"Such liens in favor of sub-contractors would equally bind the estate by consent of the owner; because such a contract, by force of the existing law, when it was made, of which the owner is presumed to be cognizant, gives his irrevocable power to his contractor, to charge and

bind his estate; and when such power is executed by the actual making of such sub-contract for labor it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor."

Donahy v. *Clapp*, 12 Cush. (Mass.) Reports, 440.

The Missouri Statute is:

"Section 6750: Every mechanic, or any person, who shall do or perform any work or labor upon, or furnish any material, fixture, engine, boiler or machinery for any building erected or improvements upon land or for repairing the same under and by virtue of any contract with the owner or proprietor thereof, or his agency, trustee, contractor or sub-contractor, upon complying with the provisions of this article, shall have a lien for his work or labor done, or materials, fixtures, engines, boilers, or machinery furnished, a lien upon such building, erection, or improvement, and upon the land belonging to such owner or proprietor upon which the same are situate to the extent of one acre."

The Supreme Court, in *Henry & Coatsworth Co.* v. *Evans*, 97 Mo., 47, say:

"The Mechanic's Lien Law, Rev. Stat. 1879, Sec. 3172 *et seq.*, gives a lien to subcontractors for materials furnished by him to the contractor and used in the construction of the building, notwithstanding the full contract price of the building has been paid in good faith by the owner to the contractor, and such lien is not limited to the amount fixed by the contract of the owner, with the original contractors." * * * *

"It has already been decided that in no event can a subcontractor assert a lien against the property for a greater amount than the reasonable market value of the materials he furnished toward the erection of the buildings or improvements. 74 Mo., 37; 63 Mo., 295; but there is nothing in this or in any other section expressly limiting the aggregate liens to the amount which the owner agreed to pay to the original contractor for the completed work." * * * *

"In the matter before us, the Mechanic's Lien Law is assumed to be in contemplation of all parties making a building contract. There is, hence, no injustice in treating them as having accepted the consequences fixed by that law."

Review of the Cases Cited by Council for Petitioner as Sustaining the Decision of the Supreme Court of Ohio.

Counsel for petitioner herein cite in support of the conclusion reached by the Ohio Court.

Sprey Lumber Co. v. *Sault St. Marie Savings Bank*, 77 Mich., 199;
Waters v. *Wolf*, 162 Pa. St., 153;
Myer v. *Burlandi*, 39 Minn., 438;
Henry v. *Rice*, 18 Mo. Ap., 512;
Renton v. *Conley*, 49 Cal., 189.

In *Sprey Lumber Company* v. *Sault St. Marie Savings Bank*, no authorities are cited by the Court in support of its position, nor is there any pretense that the statute expressly violated any particular provision of the Michigan Constitution. So far as we can judge from the opinion, the sole reason for the decision was, that the Court did not like the law.

Waters v. *Wolf*, 162 Pa. St., 153, is fully discussed by Judge LURTON in his opinion, pages 52, 53 and 54, of the Record.

We also refer the Court to the dissenting opinion of Judge MITCHELL in that case as being more in harmony with the former decisions in Pennsylvania, and with the authority of other Courts upon this subject. Among other things, Judge MITCHELL says:

> "It is the province of the Legislature to declare the public policy of the State, including what contracts shall be lawful, in what form they shall be made, and what shall be their effect. From the earliest days of the republic it has done this without question, whenever the contract itself or its collateral effect touches matters of public interest or policy, of which the Legislature is the exclusive judge. Thus under statutes all leases

for more than three years are at will only unless in writing no matter how explicitly the parties contract for a longer term. Under Statute, a loan of money is only a loan at six per cent., no matter how plainly the parties express their intent that it shall be at a higher rate. Under Statute, as well as under the common law, partnership involves certain liabilities to third parties no matter how strictly the partners may contract among themselves to avoid this result. And the Courts without the least hesitation enforce the liability of a principal for the acts of his agent within the apparent scope of his authority, no matter how contrary to his orders in fact. But it is unnecessary to multiply examples as the greatest example of all is the mechanic's lien itself. It has no other basis than the incorporation of liability for work and materials into the contract for building, by legislative mandate, without the slightest regard to the actual intentions of the parties. No one who contracts for having a house built intends apart from statutory compulsion to give a subcontractor or material-man a claim against him or his land any more than he contemplates when he orders a suit of clothes a liability to the merchant from whom the tailor buys the cloth, or to the workman who sews it together. The result follows from the statute alone, because the Legislature has enacted that a contract to build a house shall carry with it an authority to the contractor to pledge not only the house, but the land on which it is to be built, for payment of the labor and materials sold on the credit of it, even though the materials do not in fact go into it. It is the creation of an agency by the Legislature as a matter of public policy without regard to the will of the owner."

It will be found upon examination, that *Henry* v. *Rice*, 18 Mo. Appeals, 512, was the decision of an inferior Court, and was distinctly held by the Supreme Court of Missouri in *Henry & Coatsworth Co.* v. *Evans*, 97 Mo., 47, referred to above, not to be the law of Missouri.

Renton v. *Conley*, 49 Cal., 189, does not hold the statute of California, which is similar to that of Ohio, to be unconstitutional, but following the decisions of former cases, merely

construes the law in a certain way. The decision of the Supreme Court of California in 43 Cal., 514, to the effect that a law similar to that in Ohio was constitutional in that State, is still unreversed and unmodified.

In *Myer* v. *Burlandi*, 39 Minn., 438, the Court, while holding that the Minnesota Act of 1887, was void as a whole, by reason of certain unconstitutional provisions therein, also held that a former Act of Minnesota passed in 1878, Chap. 90, Minnesota Laws, remained in full force and was valid. The provisions of this former Act of 1878, were identical as nearly as may be, with those of Sec. 3184, under consideration, and have been held by the Supreme Court of Minnesota to be constitutional in *Lairdy* v. *Noonan*, 32 Minn., 358; *Bardwell* v. *Mann*, 48 Minn., 285; *Burns* v. *Sewell*, 48 Minn., 423; *Wheaton* v. *Burg*, 50 Minn., 525.

The decision in *Young* v. *The Lion Hardware Company*, announces a new and momentous principle in the interpretation of constitutional powers. It was, in effect, and indeed in words, that of the propriety of legislation, the Court, equally with the legislature, is to be the judge. Before this announcement it was considered axiomatic that within its powers the legislature alone is the judge of the policy or prudence of legislation. No man ever more forcibly announced and enforced this doctrine than did Judge SWAN in *Ex parte Bushnell*, 9th Ohio State, 77. No man ever more forcibly predicted than did he, the evils necessarily consequent upon any attempt on the part of the judiciary to interfere with the rightful exercise of legislative powers.

> "It is not a part of the functions of a Court to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions."
>
> *Powell* v. *Pennsylvania*, 127 U. S., 685.

The Ohio Court does, by its opinion, attempt "to conduct investigation of fact and enter into the question of public policy merely." It does, in effect, frustrate the legislative will embodied in the statute. There is no assertion in this decision that the law in question violates any specific provision of the constitution. There is no finding that the obligation of any contract is impaired, nor that any citizen is deprived of his property without due process of law. The sole ground of the decision is, that the Court, as well as the General Assembly, is to judge whether or not legislation imposing any restraint upon the right of contract, is for the public welfare, protection and benefit. The logical result of this decision is, that the Court is the sole judge as to whether such legislation is for the public welfare, protection and benefit, for the Court is the final judge. If it can determine, as it did in this case, that liens provided by statute are not for the public welfare and benefit, it can equally determine that interest laws, homestead laws, exemption laws, and all matters of like character are or are not for the public welfare, protection and benefit. It attempts in this decision to evade the settled rule that statutes become a part of contracts thereafter entered into by holding that this only applied to "valid" statutes, using "valid" in the sense of "wise" or "proper." But this brings us back to the same question: Who is to determine as to the validity of these statutes in that sense? The Court or the Legislature, within its legitimate powers? If the Court, then the Court legislates as effectually as if its seal were affixed to the statute.

In conclusion we might say, that the acquiescence almost without exception, of both the judicial and legislative powers of all the States and of the United States in the right, within its discretion, of the Legislature to create liens known as mechanic's liens, and to regulate the method and manner of enforcing them, and to prescribe the rights of the various

parties thereto, not only justifies this Court in upholding the constitutionality of the act in question, but forbids its doing otherwise. If the principle be wrong, then in the language of the Supreme Court of Massachusetts, *Roders* v. *Goodwin*, 2 Mass., 475: "We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law."

Respectfully submitted,

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No. 210.
Brf. of Nash No. 17,208. Respondents
Office Supreme Court U
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JAMES H. MCKENNEY
Supreme Court of the United States.
Filed Mar. 16, 1900.

OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, PETITIONER,

vs.

SOSMAN & LANDIS, ET AL., RESPONDENTS.

Brief for Sosman & Landis.

GEO. K. NASH AND
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Attorneys for Sosman & Landis.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, Petitioner,

vs.

SOSMAN & LANDIS, ET AL., RESPONDENTS.

BRIEF FOR SOSMAN & LANDIS.

This case comes into this Court upon a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

On the 9th day of January, 1896, Benjamin F. Jones, et al., one of the appellants below, filed its Bill of Complaint in the Circuit Court of the United States, whereby they sought to foreclose a mechanic's lien upon certain property of the Great Southern Fire-Proof Hotel Company for certain materials furnished by them to said company during the erection of the Great Southern Fire-Proof Hotel and Theater, between the 16th day of April, 1895, and the 29th day

of January, 1896, under and by virtue of a written contract entered into by and between said Benjamin F. Jones et al. and William J. McClain, who was during the time set out in said complaint, acting as principal contractor for the said Great Southern Fire-Proof Hotel Company in the erection of its building in Columbus, Ohio, which was to be used for a hotel and opera house.

The Bill alleged that the complainants were non-residents of the State of Ohio, that the defendant was a resident of said State of the eastern division and southern district thereof, and asserted a mechanics' lien on said building.

Joseph S. Sosman and Perry Landis, partners doing business under the firm name and style of Sosman & Landis, having their principal office and place of transacting business in the city of Chicago and State of Illinois, were made defendants in said Bill of Complaint, because they claimed and asserted a mechanics' lien upon said premises, which was of record, and the complainant prayed that Sosman & Landis be required to answer and set forth their claim in the premises.

Thereafter, and by leave of Court, on the 6th day of March, 1897, Sosman & Landis filed an answer and cross-bill in said Circuit Court of the United States for the Southern District of Ohio, Eastern Division, wherein and whereby they sought to foreclose a mechanics' lien upon certain property of the petitioner herein, the Great Southern Fire-Proof Hotel Com-

pany, for certain labor and materials furnished by said Sosman & Landis during the erection of said Great Southern Fire-Proof Hotel and Theater, between the 28th day of February, 1895, and the 26th day of March, 1896, under and by virtue of a written contract entered into by and between said Sosman & Landis and one William J. McClain, who was at the time said contract was made and said labor and material furnished, acting as the principal contractor for said Great Southern Fire-Proof Hotel Company, petitioner herein, in the erection of said building in Columbus, Ohio.

The answer and cross-bill alleged that Sosman & Landis were non-residents of the State of Ohio, that the petitioner herein was a resident of said State of the Eastern Division, Southern District thereof, and asserted a mechanics' lien on said building under and by virtue of Sections 3184, 3185 and 3185-a of the Revised Statutes of Ohio, as amended and supplemented April 13th, 1894 (91 Ohio Laws, 135), which sections as amended and supplemented are as follows, to-wit:

> "Section 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water-craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any

gas well, oil well or any other well, or performs labor of any kind whatsoever, in altering, repairing or constructing any oil derrick, oil tank, oil or gas pipe line or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof or his agent, trustee, contractor or subcontractor, shall have a lien to secure the payment of the same upon such boat, vessel, or other water-craft, or upon such house, mill, manufactory or other building or appurtenance, fixture, bridge or other structure, or upon such gas well, oil well, or any other well, or upon such oil derrick, oil tank, oil or gas pipe line and upon the material and machinery so furnished and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed.

"Section 3185. (Filing of Lien.) Such person, in order to obtain such lien, shall within four months from the time of performing such labor or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material, and a description of any promissory note or notes given for such labor, machinery or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the

amount and times of payment to be made thereunder, and a description of the land on which the gas well, oil well, or other wells are situated, or the land on which the house, mill, manufactory, or other buildings, or appurtenances, fixture, bridge, or other structure may stand, or to which it may be removed; and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof; and there shall be no homestead or other exemption against any lien under the provisions of this chapter.

"Section 3185-a. In all cases where the labor, material or machinery referred to in Sections 3184 and 3185, shall be furnished by any person other than the original contractor, with such owner, or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion

between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery. Provided if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, material men or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section thirty-one hundred and eighty-four, the Court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such subcontractors, material men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

The labor and materials furnished by Sosman & Landis, which were the foundation of the cause of action set out in its answer and cross-bill, were furnished and delivered as appears by said answer and cross-bill, between the 28th day of February, 1895, and the 26th day of March, 1896, and they were all used in and about the erection of said hotel and opera house, erected by William J. McClain for the petitioner, The Great Southern Fire-Proof Hotel Company.

The said Sosman & Landis fully complied with the terms of said statute, and filed their mechanics' lien as required by said law, all of which was done and

performed before the decision of the Supreme Court of Ohio in *Young vs. The Lion Hardware Company*, decided December 8th, 1896, and reported in 55 O. S. 423, holding that said Section 3184, as amended, was unconstitutional, and before any decision of the Supreme Court had been rendered holding said section unconstitutional.

On the 12th day of April, 1897, the petitioner herein, The Great Southern Fire-Proof Hotel Company, filed a general demurrer to the answer and cross-bill of said Sosman & Landis, the ground of said demurrer being that said sections were contrary to the Constitution of the State of Ohio and of the United States, and were therefore unconstitutional.

Judge Sage of the Circuit Court, following the decision of the Supreme Court of Ohio, found said sections were unconstitutional, and sustained said demurrer, and judgment was entered dismissing the cross-bill. The case was duly appealed to the Circuit Court of Appeals for the Sixth Circuit, and the judgment of Judge Sage was reversed, and the Circuit of Appeals overruled said demurrer and found and held that said sections were not repugnant to the Constitution of the State of Ohio or of the United States, and that said laws were valid, constitutional enactments. From the decision of the Circuit Court of Appeals, the petitioner sued out his writ of certiorari to this Court, and the petitioner now seeks in this Court to reverse the decision of the Circuit Court of Appeals, holding said enactments constitutional.

It was claimed by the petitioner in the demurrer, and by the arguments of its counsel, that said Section 3184, as amended, was unconstitutional. There was no objection to the answer and cross-bill upon any other grounds.

The petitioner further argued that the demurrer should have been sustained in the Circuit Court of Appeals for the reason that the decision of the Supreme Court of Ohio in *Young vs. The Lion Hardware Company* above referred to, was conclusive upon the Courts of the United States, and that said Courts were bound by that decision. These two propositions were the only questions argued by counsel and considered by the Circuit Court of Appeals, and as we understand it, are the only ones raised in their brief in this Court. The questions raised by the demurrer to the Bill of Complaint filed by Jones, et al., and by the demurrer filed to the answer and cross-bill of Sosman & Landis, are identically the same, and the cases have been presented and argued together, and are heard as one case.

We maintain, in behalf of Sosman & Landis, that the decision of the Supreme Court of Ohio, above referred to, is not binding upon the United States Courts for the following reasons:

1. The cause of action set out in the answer and cross-bill, accrued before the decision of the Supreme Court of Ohio was rendered or announced.

2. The former decisions of the Supreme Court of Ohio upon similar contracts and liens, are in conflict

with that decision, and the cause of action set out in the answer and cross-bill accrued before such former decisions were reversed by the holding in *Young vs. The Lion Hardware Company.*

3. The constitutional question is one of general constitutional law, not peculiarly applicable to the Constitution of the State of Ohio, but equally applicable to any and all Constitutions, including State and Federal.

4. The question is one of general jurisprudence and commercial law.

I.

Sosman & Landis furnished the labor and materials, which is the foundation for the cause of action set forth in their cross-bill before the Supreme Court announced its decision in *Young vs. The Lion Hardware Company,* and before any decision was announced holding the sections of the statute upon which their lien is based, unconstitutional. As set out in their cross-bill, the labor and materials were furnished between February, '95, and March, '96, and the decision of the Supreme Court holding said sections invalid, was not announced until December, 1896.

The labor and material had been furnished, and the lien had been perfected long before this time. Sosman & Landis were non-residents of the State of Ohio, and when they examined the statutes and ascertained their rights before furnishing said labor and material, they had the right to presume that the statute was consti-

tutional, and that their rights would be protected thereunder, and under these circumstances, we think that the decisions of this Court have clearly established that this Court will act independently of the Ohio Court, and while giving due weight to its decision, will still of itself and independently of the Ohio Court, decide whether or not said law was in fact unconstitutional.

In *Burgess vs. Seligman*, 107 U. S., 20, Justice Bradley, speaking for the Court, on page 33 says:

> "When contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or where there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued."

And after stating that the Courts of the United States will endeavor to avoid any unseemly conflict with the well-considered decisions of the State Court, he says:

> "As, however, the very object of giving to the national Courts jurisdiction to administer the laws of the States in controversies between citizens of different states, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their

duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

In *Anderson vs. Santa Anna Tp.*, 116 U. S., 356, Justice Harlan, on page 362, in delivering the opinion of the Court, says:

"In *Burgess vs. Seligman*, 107 U. S., 20, 33, the Court had occasion to re-examine all its prior adjudications concerning the obligation of the Federal Courts, to follow the decisions of the State Courts upon questions of local law. Mr. Justice Bradley, speaking for the whole Court, after observing that the Federal Courts had an independent jurisdiction in the administration of state laws co-ordinate with and not subordinate to that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of these laws, said: 'So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases for the sake of harmony and to avoid confusion, the Federal Courts will lean to an agreement of views with the State Courts if the question seems to them balanced with doubt.' Any other rule, it was further said,

would defeat 'the very object of giving to the National Courts jurisdiction to administer the laws of the states in controversies between citizens of different states.'"

Judge Lurton, in delivering the opinion of the Circuit Court of Appeals below, referring to the case of *Young vs. The Lion Hardware Company*, supra, on page 46 of the transcript says:

"Does that decision furnish a rule of decision which is obligatory upon Courts of the United States? When a citizen of one state enters into a contract with a citizen of another, he acquires the constitutional right to have that contract interpreted and enforced by a Court of the United States. That right does not by any means involve the application of a different rule of decision, for the judiciary act requires that the laws of the several states shall be regarded as rules of decision, in trials at common law, where they apply. But even the decision of the highest Courts of the state by whose law the rights of the parties are to be ascertained and enforced, does not, under all circumstances, furnish a rule of decision obligatory upon courts of the United States. The question is, when do they apply? In the past, this inquiry has involved no little friction between the Courts of the Union and those of the states. But the final arbiter of all such constitutional questions is the Supreme Court of the United States. So far as the inquiry is pertinent to the

decision which must be here made, that Court has in an authoritative way decided:

"1. That such decisions are not necessarily obligatory upon Courts of the United States where they effect contracts which were valid under the Constitution and laws of the state as interpreted and enforced by its highest judicial tribunals at the time they were entered upon.

Rowan vs. Runnels, 5 How. 134.
Ohio Life and Trust Co. vs. Debolt, 16 How. 432.
Gelpcke vs. The City of Dubuque, 1 Wall. 175.
Olcott vs. The Supervisors, 16 Wall. 678.
Taylor vs. Ypsilanti, 105 U. S. 60.
Douglass vs. County of Pike, 101 U. S. 677.
Louisville Trust Co. vs. Cincinnati, 47 U. S. A., 36, 46.

"In *Rowan vs. Runnels*, supra, Chief Justice Taney said: 'Undoubtedly this Court will always feel itself bound to respect the decisions of the State Courts, and from the time they were made regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this Court, were lawfully made.'

"In *Douglass vs. County of Pike*, cited above, the Court, after reviewing the preceding cases, decided by that Court, said: 'The true rule is to give a change of judicial construction in respect

to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'

"2. Neither are such decisions obligatory upon Courts of the United States when thereby the validity of contracts between a citizen of the state and a citizen of another state is affected, which were executed before there was any judicial construction of the statute or constitution which seemed to authorize the contract in question.

Burgess vs. Seligman, 107 U. S. 20-33.

Pleasant Township vs. Aetna L. Ins. Co., 138 U. S. 67-72.

Louisville Trust Co. vs. Cincinnati, 47 U. S. A., 36-47."

We call especial attention to the opinion of Judge Lurton, in discussing this proposition of law, on pages 46 and 47 of the transcript in this case.

The same rule of law is recognized in *Miller vs. Ammon*, 145 U. S., 421, in the opinion of the Court on page 423, where

Burgess vs. Seligman, 107 U. S. 20;
Carroll County vs. Smith, 111 U. S. 556;
Gibson vs. Lyon, 115 U. S. 439, and
Anderson vs. Santa Anna Township, 116 U. S. 356,

are cited as instances in which this Court did not consider itself bound by the decisions of the State Courts.

In *Burgess vs. Seligman*, supra, Justice Bradley, in delivering the opinion of the Court, said:

> "We do not consider ourselves bound to follow the decision of the State Courts in this case."

Pleasant Township vs. Aetna Life Insurance Co., 138 U. S. 67, was a decision in which this Court refused to follow the construction placed upon the law by the State Court, although after an independent examination they reached the same conclusion. That was a case in which the constitutionality of the Ohio statute was brought in question; and the Supreme Court of Ohio decided the law was repugnant to the Constitution of Ohio in *Wyscaver vs. Atkinson*, 37 O. S., 80. After the bonds had been issued in a suit upon certain of these bonds in the case above referred to in this Court, Justice Brewer, on page 72, in delivering the opinion of the Court, said:

> "We are not concluded by that determination. In matters of contract especially, the right of citizens of different states to litigate in Federal Courts of the various states is a right to demand the independent judgments of those Courts. The settled law in that respect is well stated in the case of *Burgess vs. Seligman*, 107 U. S., 20, 33."

See also *American and English Encyclopedia of Law*, Volume 27, page 600, and the notes and cases cited in the notes.

Both the Circuit Court and the Circuit Court of Appeals recognized and followed this rule of law, and it seems to us there can be no dispute about the correctness of this proposition.

2.

The decisions of the Supreme Court of Ohio, prior to the one announced in *Young vs. The Lion Hardware Company*, in cases involving the same constitutional questions, are certainly in conflict with that opinion, and under the earlier decisions of that Court, we believe that the law now in question is constitutional, and that the decision of *Young vs. The Lion Hardware Company* is a departure from the settled construction as theretofore announced by that Court.

If we are correct in this conclusion, then this is an additional ground why this Court should consider this question independently of the State Court.

Ohio Life Insurance & Trust Company vs. Debolt, 16 How. 432.

Douglass vs. Pike County, 101 U. S., 677.

It is true that the Supreme Court of Ohio had not passed upon this section of the mechanics' lien law, as it had only been enacted in April, 1894, but they had recognized other laws as being constitutional which we insist were open to the same objection as the act now in question.

The cases of—

Railway Company vs. Cronan, 38 O. S. 132, and
Railway Company vs. McCoy, 42 O. S. 251.

were actions to enforce liens in favor of those contributing labor or material to the construction of the railway.

In *Railway Company vs. Cronan*, supra, Longworth, Judge, in delivering the opinion of the Court on page 124, says,—

> "The cause of action upon which suit was originally brought was created by the act of March 31, 1874 (71 Ohio Laws, 51), entitled 'an act to secure pay to persons performing labor and furnishing materials in constructing railroads,' and the solution of the question raised in this Court depends upon the proper construction of its terms."

It is true the constitutionality of the enactment was not mooted, although very able and distinguished counsel represented the railroad company which was opposed to the sustaining of the lien.

The same was true in *Railway Company vs. McCoy*, supra.

As stated by counsel for Jones, et al., in their brief in this case in the Circuit Court of Appeals:

> "The power of the legislature to regulate contracts and to point out the mode of their discharge was recognized as early as the case of *Smith vs. Parsons*, 1 Ohio, 236."

Judge Burnet, in delivering the opinion of the Court, on page 239, says,—

> "It is admitted that the states have not given up the entire power of legislating on the subject of contracts. . . . The legislature has a right by law to regulate contracts, to determine their effect and point out the mode of their discharge. These laws are applied to all subsequent engagements and fix the rights of the parties at the very instant the contract is closed, so that the contract in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continued what it was at its commencement; and it is more correct to say that the law has in part made the contract than that it has changed it."

This language is cited with approval by the Supreme Court in the opinion of the Court delivered by Judge Williams, in *Weil vs. State*, 46 O. S. 450.

It is true that in these cases constitutional questions as affecting mechanics' liens were not raised, but the principle of law relied upon by the petitioner in this case, as rendering the act under consideration unconstitutional, was certainly passed on in these cases, and adversely to the petitioner, and for this reason this Court is not bound by the decision of the Supreme Court in *Young vs. The Lion Hardware Company*.

3 & 4.

An examination of the decision of the Supreme Court in the case of *Young vs. The Lion Hardware*

Company, will disclose that the decision is based upon general constitutional law, and is not applied to any particular or peculiar provision of the Ohio Constitution different from the Constitution of any other state or the United States. It is based upon the broad ground that it abridges the liberty of the citizen, and interferes with his property rights.

Judge Lurton, in delivering the opinion of the Court below, clearly points out this fact, and quotes copiously from the decision of the Supreme Court to show the correctness of this conclusion. (See pages 50 and 51 of the transcript in this case.)

He there says,—

> "We have made these copious extracts from the opinion for the purpose of indicating that the case did not turn upon any constitutional principle peculiar to Ohio. The 'rights' supposed to be violated are rights deemed fundamental under all forms of popular and constitutional government and like declarations are to be found in all or most of our state Constitutions. The question is, therefore, one of general law, having as much reference to the Constitution of any other state as to that of Ohio."
>
> "In the case of *Whiting vs. Fond du Lac County*, 25 Wis. 188, it was held that under the Constitution of Wisconsin, a tax could not be constitutionally laid in aid of the building of a railroad. The Supreme Court of the United States refused to follow this as a decision obligatory

upon it in a case involving the validity of an act of the Wisconsin legislature authorizing a tax in aid of a railroad.

"Upon the question as to whether the decision was one of local or general law the Court, in *Olcott vs. The Supervisors*, 16 Wall, 678, 690, said:

" 'This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other state as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single state tribunal, but in general principles common to all Courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state can conclusively determine for us. This consideration alone satisfies our minds that *Whiting vs. Fond du Lac County* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect.' "

As stated by counsel for Jones, et al.,—

The decision of the Court was upon a part of the constitution common to all constitutions, and its decision had reference as much to the constitution of one state as to another state, and attempted to prescribe a rule of general constitutional construction, applicable to the constitution of any other state or even to the Constitution of the United States. This is a question of general jurisprudence, and the Court must decide it independently, and although mechanics' liens are statutory, yet being a part of the statute law of almost every state and territory, and recognized by congress as a part of the statute law of the District of Columbia, the law applicable to them may be considered in the same light as the principle regulating general commercial law, and therefore, in cases of proper jurisdiction, the subject of the independent interpretation and construction of the Federal Courts regardless of local decision, and local decisions are not binding where they affect or construe only the general powers of the legislature over the subject matter, and upon these grounds, this Court should examine this act independently of the Supreme Court of the United States, and should reach its own independent conclusion as to its validity, and we insist that any one of the foregoing reasons is sufficient ground for that examination and decision.

We desire now to call attention to the act itself, and to the arguments advanced by counsel for the petitioner, and the grounds upon which they claim this law is unconstitutional, as well as the authorities and decisions upholding and enforcing such legislation.

II.

As we understand the claim of counsel for the petitioner, when reduced to its final analysis, their objection to the law is based upon the following grounds,—

1st. That it deprives the owner of property of the right of acquiring, possssing and protecting his property and contracting in relation thereto.

2nd. It impairs the obligation of contract.

3rd. It deprives the owner of property without due process of law.

4th. It is class legislation.

The first three propositions may be discussed together, as the decisions applicable to each are so closely interwoven, that it is difficult to point out and classify the decisions on each particular subject, without overlapping into the other, and the same constitutional principle covers all three instances.

The lien asserted and sought to be enforced by Sosman & Landis in their cross-bill, is for labor and material furnished after the passage of the act of April 13th, '94, and the labor and material were all furnished and the contract completed and the lien recorded and established long prior to the decision of the Supreme Court in *Young vs. The Lion Hardware Company* holding the act to be unconstitutional.

The contract having been made, executed and performed, during the time this law stood upon the statute books of the State of Ohio, as the law of Ohio, the law must therefore be considered as forming a part

of the contract, and it does not deprive the petitioner of its property, without due process of law, nor does it impair the obligation of its contract.

As is well stated by the Supreme Court of Ohio in *Smith vs. Parsons*, 1 Ohio, supra,—the contract itself receives an impress from the law, and the law has in part made the contract.

Judge Burnet, in delivering the opinion of the Court, says,—

> "These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the contract is closed, so that the contract, in its inception, receives an impress from the law, and the effect of the law being coexistent with the contract, can never be said to alter or impair it. It continues what it was at its commencement; and it is more correct to say that the law has in part made the contract, than that it has changed it."

And on page 238, he says,—

> "Although a state legislature can not pass laws impairing contracts, yet they may regulate them, prescribe their form, their effect and the mode of their discharge, *and every contract is supposed to be made with reference to those laws.*"

And on page 239 he clearly points out the reason upon which this principle of law is based.

In *Weil vs. The State*, 46 O. S. 450, Judge Williams in delivering the opinion of the Court, after quoting from the language of Judge Burnet, already pointed out, on page 452 says,—

> "Persons contracting after the passage of the statute, could not know the law was one impairing the obligation of contracts in the sense of the constitution, but as an act regulating future contracts and defining their effect."

And on page 453, in quoting from Judge Burnet in the same case, he says,—

> "Instead of determining the validity of the statute by reference to the alleged intention of the parties to the contract, we must fix the *legal intent of the parties, as well as the nature and extent of the obligation of the contract by reference to the statute.*" And again, — "Contracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in a law, *as if that provision had been inserted in, and formed part of the contract.*"

In *Smith et al. vs. Newbauer et al.*, 144 Ind., 95, the Court say in the first paragraph of the syllabus,—

> "Section 7257 R. S., 1894, providing that a mechanics' lien may be acquired, by filing in the recorder's office a notice of intention to hold the lien, within sixty days after performing labor or furnishing material, is not unconstitutional as depriving the owner of his property without due process of law."

This Court will observe that the law under consideration was very similar to the Ohio law, and it was certainly open to all the objections that can be raised

on constitutional grounds against the Ohio law. The same argument was made in that case, as is made by the petitioners in the case at bar. They vigorously asserted that that law prevented the owner from paying cash for his building, or paying for it in advance or paying for it with other property, and made all the other questions that are argued by counsel for the petitioners in the case now before this Court.

Judge Howard, in delivering the opinion of the Court, on page 96, says,—

> "In support of the demurrer to the complaint, it is first contended that the mechanics' lien law in this state is invalid, as repugnant to Section 1, Article XIV of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property, without due process of law." . . .

In discussing this question farther on in the opinion, he says,—

> "It has often been held that every statute under which a contract is made, enters into and forms a part of such contract. The appellants, in the contract for the erection of the dwelling house upon their property, are therefore chargeable with knowledge of, and are bound by all the provisions of our mechanics' lien laws then in force. By the terms of the agreement entered into, the contractors were to furnish all materials necessary for the construction of the building. This was notice that such materials were to be

furnished; and the law, under which the contract was made, was further notice that the building and the ground upon which it was to be erected, would be liable to a lien for the value of the materials so furnished."

On page 98, he says,—

"It is intimated that the law hampers the freedom of action of the property owner; that he may desire to pay the contractor in advance, or to pay him by an exchange of other property for the erection of the building; and that it may be an inconvenience, or induce the contractor to bid higher for the work, if payment is to be delayed for sixty days after the work is done. *These, however, are considerations that should be addressed to the legislature, and not to the Courts.* Besides, it is to be remembered that without the right to a lien on the property, laborers and material men would, in many cases, have no security for their toil or the materials furnished by them. The laborer is worthy of his hire, and the seller of goods ought to be paid for them. As the law stands, all parties are secured in their rights. The owner, by seeing that laborers and material men are paid, or by keeping back for sixty days from the contractor, sufficient to make such payment, is in no danger of having to pay twice for his building; while at the same time, the man whose labor and material has gone into the building, can look to the building itself, and to the

ground upon which it stands, for his security. The property owner enjoys the benefit of this work and of this material, and it is but just that he should be charged, for at least sixty days, with the responsibility of seeing that they are paid for."

In this case, there was a petition for a rehearing, and after a careful and full consideration, the original decision of the Court was sustained and upheld.

Judge Howard, in delivering the opinion of the Court, on the petition for rehearing, on page 102 says,—

"We were of opinion that the validity of the mechanics' lien law of this state was fully considered and affirmed in the original opinion. That law does not provide for depriving an owner of his property without his consent. On the contrary, the law which enters into and forms a part of his building contract, is notice to him that his land, and the building to be erected thereon, are liable to a lien for the value of the labor and materials which may enter into its construction. He voluntarily contracts for this labor and material with notice from the statute of the inchoate lien thereby authorized. The statute, moreover, in the interest of the owner prevents the fixing of the lien unless notice be given him within sixty days from the time of the furnishing of the labor and material. His property is therefore not taken without due process of law. See *Colter vs. Frese*, 45 Ind., 96."

The provision for obtaining the lien under the Indiana statute was the same as that in the Ohio statute, to-wit, by filing a sworn statement with the recorder, setting out the labor and material as required by the statute, the only difference being that in Ohio, he had 120 days to do this, while in Indiana he had 60.

Judge Howard, in this opinion, on pages 102-3, cites Section 33-a of Phillips on Mechanics' Liens (3d Ed.), with approval. It is there held that the owner may by contract or indemnity bond, protect himself against double payment for such labor and material.

Citing,—

> *Mallory vs. LaCrosse Abbatoir Co.*, 80 Wis. 170, and also distinguishes the case of *Sprey Lumber Company vs. Savings Bank Company*, 77 Mich. 199.

At the bottom of page 103 he says,—

> "The statute in the case at bar, however, is one with reference to which appellants entered into their building contract, and according to which they consented to the lien that followed. Such consent included an agreement that those who should furnish to the contractors and subcontractors, the material which should go into the building, might have sixty days after furnishing the same, within which to give notice of their intention to hold such lien. we have no doubt of the constitutionality of the law."

In *Colter vs. Frese*, 45 Ind. 96, cited by Judge Howard in the opinion above quoted, the validity of an act such as the one now in question, was ably sustained

and upheld by Judge Warren, who delivered the unanimous opinion of the Court.

The opinion of the Circuit Court of Appeals, as delivered by Judge Lurton, contains such a full, complete and exhaustive discussion of this whole question, that it hardly seems necessary to cite further authority on this subject. We have endeavored, however, to call attention to a few recent decisions that were not mentioned in that opinion, some of which have been decided since this case was decided in the Court below.

In *Title Guarantee & Trust Company vs. Wrenn*, 56 Pac. Rep. 271, the Supreme Court of Oregon say in the first paragraph of the syllabus,—

> "Code Section 3672, providing that where improvements are constructed on lands with the owner's knowledge, the interest of the owner shall be subject to lien unless within three days after notice of the construction he gives notice, in writing, posted on the land, that he will not be responsible for the improvement, is not unconstitutional, on the ground that it permits a lien to attach without the consent of the owner, since it only prescribed what shall be evidence of the owner's consent."

The provision of the Oregon statute was challenged in that case, on the ground that it was unconstitutional, because it permitted the contractor or subcontractor to obtain a lien without the authority or consent of the owner.

The Court say in delivering the opinion,—

"Similar provisions of mechanics' lien laws have been sustained and enforced even in the state to whose reports we are referred for counsel's leading authority. See

Wheaton vs. Berg, 50 Minn. 525.

Lumber Company vs. Newkirk, 80 Cal. 275.

" . . . . So that we conclude this section is not open to the constitutional objection urged."

In *Albright vs. Smith et al.*, 3 S. Dak. 631, the Court say in the syllabus,—

"By Section 5470 Comp. Laws, a subcontractor is entitled to a lien as defined in the preceding section, for labor done or material furnished, if within sixty days after the doing of the labor or the furnishing of material he files with the clerk of the Circuit Court of the proper county or subdivision the account of the demand due him as therein provided."

"2. Such lien within the limit of the contract price between owner and contractor, may be enforced irrespective of the state of the account between the owner and the contractor, or the amount due or unpaid upon such contract."

"3. So construed, said Section 5470 is not unconstitutional, as impairing the obligation of the contract between the owner and the contractor."

Kellam, Judge, in delivering the opinion of the Court on page 632 says,—

"The former opinion of this Court may be found in 2 S. D. 577, where the questions then considered as controlling in the case, were discussed at length."

Upon referring to that decision this Court will find that that Court say in the syllabus,—

"1. A subcontractor who furnishes materials, lumber or labor, not to the owner, but to the contractor for the erection of a new building, can, under the provisions of Section 5469, 5470 Comp. Laws, acquire and enforce a lien on the building, and on the interest of the owner of the real estate on which th building stands, to the extent of the value or the price agreed to be paid by the contractor for the material, lumber or labor furnished.

"3. If a subcontractor files his claim within sixty days after he has furnished the material or performed the labor, he is entitled to his lien without any further notice than such filing may give the owner.

"4. It is not the contract between the original contractor and the owner which supports the lien under the statute, but it is the use of the material and work upon the premises — the putting of them into the building and attaching them to the free hold, whereby the owner is benefited by them, which entitles the party furnishing them to a lien to the extent of their value."

Bennett, Judge, in delivering the opinion of the Court, after discussing the facts in the case and making the statement that the question was before that Court on questions of law only, on page 583 says,—

"A large number of assignments of error was made, but the questions involved in the bill and arising on the errors assigned, were as follows,— . . . .

"2. Are Sections 5469, 5470 Comp. Laws constitutional, when construed to allow subcontractors a lien by simply showing a compliance therewith by filing a claim for a lien with the clerk of the Court within sixty days after the last material was furnished, and without presenting or serving the owner with a statement or copy thereof within thirty days after the last of such materials were sold and furnished? . . . . This action is based upon the following section of our code, relating to mechanics' liens: 'Section 5469. Every Mechanic or other person who shall do any labor upon, or furnish any material, machinery or fixtures for any building, erection or other improvements by virtue of any contract with the owner, his agent, trustee, contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done or material, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to the owner on which the same is situated, to secure the pay-

ment of such labor done, or material, machinery or fixtures furnished.' . . . .

"'Section 5470. Every subcontractor, wishing to avail himself of the benefits of this chapter, shall within sixty days after the material shall have been furnished, or labor performed, file with the clerk of the District Court of the county, or the judicial subdivision in which the building, erection or other improvements to be charged with the lien is situated, a just and true account of the demand due him, after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by affidavit; but a failure to file the same within the time aforesaid, shall not defeat the lien except as against purchasers or encumbrancers in good faith, and without notice, whose right accrued after sixty days, and before any claim for the lien was filed, or against the owners, except the amount due the contractor at the time of filing the same.'"

It was claimed in this case, as in the case at bar, that this statute deprived the owner of his property without due process of law, and impaired the obligation of the contract, and for that reason was unconstitutional.

Judge Bennett, on page 587 of the opinion, says,—

"The appellant further contends that if the lien law should be so construed as to give a lien to the respondents, without giving the owner no-

tice, it impairs the obligation of the original contract and operates to effect the taking of appellant's property without due process of law, and is void because unconstitutional. . . . In answer to this, we would say that the liability of the owner of the building, which is being erected or repaired, to pay a subcontractor for labor performed or materials furnished, is not placed on the ground of the contract made with the owner by the person performing the labor or furnishing the material, because usually there is no such contract between them, but upon the ground that as the labor and material contributed to the erection or reparation of the building of which the owner receives the benefit, the law imposes upon him the responsibility for sixty days, at least, of seeing that the claims are paid. . . . It prevents the owners of real estate from securing to themselves, without compensation, the benefits of the labor and materials of others, by means of low contracts with irresponsible or perhaps dishonest contractors. Were it otherwise, however, and the lien operated directly upon the contract, it could not have the effect contended for by the appellant.

"When a contract is entered into by the parties, it is not the contract which creates the lien under the statute, but it is the use of the materials and work upon the premises, the putting of them into the building, and attaching them to the free-hold,

which entitles the party furnishing them to a lien to the extent of their value. Further, it is a well known and elementary principle that contracts must be expounded according to the law in force at the time they were made. The law under which a contract is made is a part of the contract, as much as though it were incorporated into it. When appellant contracted with defendants, Smith Brothers, whereby he contracted to pay them for the erection of the building, as it progressed, and did so, it was at his risk; for the law, which was a part of the contract, said: 'If there are subcontractors who have furnished material and performed work for this contractor, they shall have their full pay; if the contractor does not pay them, the owner of the building must pay them; if he does not, they shall have a lien upon the building for sixty days at least to enforce their payment.' The inconveniences of the law do not seem to to us to be insuperable. They are based upon the real or supposed hardship that in many instances it subjects the owner to the liability of making double payments for the same work or material, and prevents him from making contracts for the erection of buildings and the furnishing of materials to be paid for otherwise than in money, and many other similar inconveniences. These might have much force if addressed to the legislature, the law-making power, and we may have very serious doubts as to the

policy or the necessity of such a law, and we can, with propriety, recommend to the legislature that it would be wise and beneficial that it should be changed in this particular, yet these considerations can not have much weight against the clear and unequivocal terms of the statute. Still, if these inconveniences exist, they can always be provided against at the time the contract is made. The owner can protect himself by a bond or other security, or may make such a contract as will allow him to withhold from the contractor for a period of sixty days after the completion of the work, enough to protect the property from liens for work or material performed or furnished by persons other than the original contractor. There are many other states whose mechanics' lien laws are similar in their main features to ours, and many of them have been construed by the Supreme Courts of those states, and those decisions are in harmony with the conclusions herein enunciated."

Citing,—

Gardner vs. Leck, 42 N. W. 1120;
Donahy vs. Clabp, 12 Cush. 440;
Parker vs. Bell, 7 Gray 429,

and many other cases.

In the case of *Gardner vs. Leck*, supra, the Court, in answer to the argument that such a lien law amounts to the taking of property without due process of law, and interferes with the owner's right and freedom of contract, says,—

"This question is not a new one, but has been frequently raised and met in the case of lien laws in various states which contain the same general features, and while the policy of such laws has been often questioned, yet so far as we have discovered, they have always been upheld as valid. . . . That while no man can be deprived of his property without his consent, and while the basis of a right to a lien against property is the consent of the owner, yet the contract of the owner with the contractor, made under and subject to the provisions of an existing lien law, is evidence of the authority of the latter to charge the property with the liabilities incurred by him in performing his contract, and operates by virtue of the statute as authority to do so."

The same principle is recognized and upheld in *Donahy vs. Clapp*, supra, where Chief Justice Shaw says—

"Such a contract, by force of the existing law when it was made, of which the owner is presumed to be cognizant, gives his irrevocable power to his contractor to charge and bind his estate, and when such power is executed by the actual making of such contract, it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor."

As is well stated by the Supreme Court of Minnesota, above referred to, the question now before this Court is not a new one, and the mechanics' lien law of Ohio which is attacked in this case, contains the

same general features of the laws of the various states of the Union, which have been almost universally upheld, there being, as stated by Judge Lurton, in the opinion below, but two well defined exceptions to this rule—those in the states of Michigan and Pennsylvania, and as already pointed out by the Supreme Court of Indiana, the Michigan law can be distinguished from our case, and as stated by Judge Lurton, in the opinion below (see page 54 of the transcript),—

> "The Ohio act involved here, contains no provision *expressly prohibiting an agreement limiting the supposed agency of the contractor for the owner*, or restraining him from creating any lien, such as was contained in both the Michigan and Pennsylvania statutes. If such acts are properly to be regarded as constituting the contractor a special agent for the owner, to which he consents by making a contract with the law before him, it would seem that the Ohio act would be valid, there being no inhibition of an agreement withholding such power, and no intimation that the hotel company, in this instance, limited the implied agency of the contractor. Certainly the Pennsylvania decisions give no support to the decision of the Ohio court that the Ohio act is void. Under the settled line of decisions in Pennsylvania the Ohio act is valid. In the last Pennsylvania case, that of *Waters vs. Wolf*, cited above, the Court announces its adherence to the long line of decisions upholding just such a statute as

the Ohio act involved here, saying,— 'In the absence of an express contract against liens, with a statute before him giving a lien to those with whom he contracted, the consent of the owner that a remedy be given by law should be enforced under the contract, was certainly to be implied.'

"In all, or nearly all of the states there are statutes intended to give liens to those who contribute labor or materials to the enhancement or improvement of the land or buildings of an owner."

In application of what is here said we desire to call especial attention to the decision of Chief Justice Gibson in *White vs. Miller*, 18 Pa. 52, the opinion beginning on page 53, where he says,—

"As soon as owners of lots ceased to be their own builders, they put it in the power of the persons employed by them to occasion losses to mechanics and material men which they ought not to bear; and it was to remedy this mischief that the legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just but a convenient one. Whether the builder be the agent of the owner, or an independent contractor, his appointment to the job creates a confidence in him which was not had before, and the consequences of a false confidence ought not to be borne by those who had no hand in occasioning

it. Nor does the rule of the legislature bear hard on the owner. He has it in his power to detain the price of the building while there are outstanding charges against it or to stipulate for security against those that might afterwards turn up; and if he use common prudence, any loss which occurs will eventually fall on the author of it. If he do not, he can not charge the mechanic or material men with the consequence of his own supineness."

See also,—

Taylor vs. Murphy, 148 Pa. 337.

The following decisions have upheld the constitutionality of similar laws to the one now under consideration:

In New York,—

Blauvelt vs. Woodworth, 31 N. Y. 284.

Glacius vs. Black, 67 N. Y. 563.

In Minnesota,—

O'Neil vs. St. Olaf's School, 26 Minn 329.

Bohn vs. McCarthy, 29 Minn. 23.

Laird vs. Noona, 32 Minn. 358.

Gardner vs. Leck, 48 N. W. 1120.

In Maine,—

Spofford vs. True, 33 Me. 283.

Taggard vs. Buckmore, 42 Me. 77.

In Wisconsin,—

Mallory vs. LaCrosse Abattoir Co.. 80 Wis. 170.

In Missouri,—

Henry & Coatsworth Company vs. Evans, 97 Mo. 47.

In Massachusetts,—

Parker vs. Bell, 7 Gray 420.

Donahy vs. Clapp, 12 Cush. 440.

Bowen vs. Phinney, 162 Mass. 593.

In Tennessee,—

Cole Manufacturing Co. vs. Falls, 90 Tenn. 471, and cases there cited.

In California,—

Hicks vs. Murray, 43 Cal. 515.

In Rhode Island,—

Gurney vs. Walshan, 16. R. I. 699.

In Virginia,—

Roanoke etc. Co. vs. Karn, 80 Va. 589.

N. & W. Ry. Co. vs. Howison, 81 Va. 125.

In Washington,—

Spokane Co. vs. McChesnay, 1 Wash. Rep. 609.

In Connecticut,—

Payne vs. Tillinghort, 52 Conn. 632.

In Maryland,—

Frensch vs. Shyrock, 51 Md. 162.

These authorities were all examined and cited in the opinion of the Court of Appeals below.

Judge Lurton, in this opinion (see page 55 of the transcript), says,—

> "In a large number of cases, the question of the constitutionality of acts extending the lien to subcontractors and others having no direct contractual relation with the owner has been brought in question, and the validity of the legislation upheld. In still other instances, such acts have been enforced without question as to their

constitutionality. We cite a number of cases, though by no means all, in which acts involving questions identical with those raised by the Ohio statute have been enforced either after their validity had been challenged or *sub silentio.*"

And after citing decisions from the courts of last resort of very many of the states on this question, on page 59 of the transcript, he says,—

"The direct question as to the constitutionality of acts extending a lien to subcontractors and material men furnishing materials at the instance of contractors, has not arisen in the Supreme Court of the United States, nor in any of the United States Courts of Appeals, so far as we have been able to discover."

He then calls attention to the act of congress, passed March 2, 1833, 4 Statute at Large, 695, giving a lien in the District of Columbia upon buildings to all persons who did work or furnished materials on an order of the contractor, and the decision of this Court in the case of *Winder vs. Caldwell,* 14 How. 434, in which case a subcontractor's lien was upheld and protected although the constitutionality of the enactment was not raised. In that case Justice Greer, in speaking for the Court, said,—

"The aim and policy of this act is also obvious. Experience has shown that mechanics and tradesmen who furnish labor and material for the construction of buildings are often defrauded by insolvent owners and dishonest contractors. Many

build houses on speculation, and after the labor of the mechanics and materials are incorporated in them, the owner becomes insolvent, and sells the buildings or incumbers them with liens; and thus one portion of his creditors are paid at the expense of the labor and property of others. Or, the insolvent owner, who builds by the agency of the contractor or middleman, pays his price and receives his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is not to secure contractors who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection of those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated."

Judge Lurton, in discussing this feature of the case on page 60 of the transcript, says,—

"In *Grant vs. Strong*, 18 Wall. 623, and *McMurray vs. Brown*, 91 U. S. 258, and *Van Stone vs. Stillwell & Brice Manufacturing Co.*, 142 U. S. 128, the question of waiver of the lien given under various state statutes, was considered. In considering the character and nature of the lien the Court, in *McMurray vs. Brown*, 91 U. S. 258-266, said,—

"'Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed, or the promised materials are furnished; the principle being, that the parties are supposed to contract on the basis that, if the stipulated labor is performed or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time.'

"In *Van Stone vs. Stillwell & Brice Manuf'g Co.*, 142 U. S. 128-136, it was said,—

"'*It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material man and laborer his lien under the statute.* The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of or with reference to, the statute.'

"In *Central Trust Company vs. London*, 31 U. S. A., 387-422, a lien in favor of subcontractors was enforced against mortgagees by this Court. Judge Taft, in delivering the opinion of the Court, touching the character of the lien, said,—

"'A subcontractor's lien under the statute is not dependent on the principal contractor's having perfected his lien. *Green vs. Williams*, 8 Pickle (Tenn.) 220. It is independent of, and

superior to, his lien, and is only limited by the amount due to the principal contractor at the time of the service of notice by the subcontractor on the railroad company. Therefore, the assignee of a principal contractor's lien is junior to the subcontractor who has perfected his statutory lien.'

"In *Central Trust Company vs. Richmond, etc., R. Co.*, 31 U. S. A., 675-688, we enforced a lien in favor of such subcontractors arising under a Kentucky statute. Touching the origin and nature of the lien, we said,—

" 'It is not a lien originating in a contract for a lien, but arises out of the statute independent of any agreement for a lien, and is based upon the equity of paying for work done or materials delivered.' . . .

" 'The clear purpose of the Kentucky statute was to make the liens of the contractor and subcontractor independent, direct liens, the latter limited only by the amount of the original contract price. The lien of the subcontractors does not spring out of the lien of the contractor, and is not derived therefrom or subordinate thereto. The aggregate of all liens is not to exceed the contract price agreed to be paid by the owner, but this limitation concerns not the fact of a lien, but the extent thereof. Being a direct lien, its existence does not depend upon the existence or non-existence of a contractor's lien, and the

waiver of a lien by a contractor, will not affect the subcontractor's lien.' "

Before passing from the cases decided by the Supreme Court of the United States, in which a lien law was recognized and enforced, although the question as to the constitutionality of the laws was not raised, and where, as stated by Judge Lurton, the Court sustained such laws *sub silento*, we desire to call attention to the very recent decision of this Court, in the case of *Springer Land Association vs. Ford*, 168 U. S. 513, where the mechanics' lien law of New Mexico was upheld and enforced.

On page 521 of this report, the provisions of the New Mexico statute then under consideration, are set out in full. We quote from these pages as follows,—

"Section 1519. A lien is a charge imposed upon specific property by which it is made security for the performance of an act.

"Section 1520. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for work or labor done or materials furnished by each respectively, whether done or furnished at the expense of the owner of the building or other

improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining or of the construction, alteration or repair, either in whole or in part of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act."

The other sections of the statute are set out, but we have quoted sufficient to show that the New Mexico law is almost identical with the section of the statutes of Ohio now under consideration.

The law of New Mexico, quoted above, is open to all the objections that can be made to the Ohio law. It is true a constitutional question was not raised in that case, but if the law was void, the lien could not be upheld.

We call especial attention to the syllabus of the case, and the opinion delivered by Chief Justice Fuller on page 524.

This Court, in *Van Stone vs. Stillwell & Brice Manuf'g Co.*, 142 U. S. 128-136, has recognized the same principle of law set forth in the numerous decisions, sustaining subcontractors and material men's liens, and in answer to the argument that it takes the owner's property without his knowledge or consent, and deprives him of his property without due process of law, and interferes with his freedom to contract, it is there stated by Justice Lamar on page 136:

"*It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the*

material furnished, and the work and labor expended by the contractors, whereby the building becomes a part of the freehold that gives the material man and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into *presumably in view of*, or with reference to, the statute.

The cases sustaining mechanics' lien laws, such as the one now before this Court, proceed upon this theory, and we insist that it is the correct one. The following are a few of the principal cases upholding this doctrine:

Cole Mfg. Co. vs. Falls, 90 Tenn. 466
Henry & Coatsworth Co. vs. Evans, 97 Mo. 47.
Mallory vs. LaCrosse Abattoir Co., 80 Wis. 170.
Smith et al. vs. Newbaur, 144 Ind. 95.
Albright vs. Smith, 2 S. D. 577.

The argument that the act in effect deprives the owner of his property without due process of law, and impairs the obligation of contract, is so clearly answered by Judge Lurton in the opinion of the Court below on pages 64 and 65 of the transcript, that we wish to repeat what is there said.

He says,—

"Such statutes rest upon the principle of natural justice, which lies at the foundation of the many liens or preferances among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But if the owner makes the con-

tract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who at the instance of his contractor shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it can not be said to impair the obligation of a contract.

"If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. 'The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect.'

Edwards vs. Kearzy, 96 U. S. 595.
Greenwood vs. Freight Co., 105 U. S. 13.
Denny vs. Bennett, 128 U. S. 489.
Smith vs. Parsons, 1 Ohio, 236.
Weil vs. State, 46 O. S. 450.

"Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he

is deprived of his property without due process of law.

"*Provident Institution vs. Jersey City*, 113 U. S. 506-514."

See also,—

New York vs. Squire, 145 U. S. 175.

The reasoning we insist is sound, and the policy of the rule a wise one.

The policy and benefit of such laws have been ably and clearly pointed out by this Court, as early as *Winder vs. Caldwell*, supra, and nearly all of the State Courts have adopted the same views. The liberty granted by the Constitution of the United States and the State of Ohio , is not intended to be a license for a person to do whatever he pleases in his individual acts or with his property. It is a liberty restrained by such legislative enactments as may be for the general public good, and what is for the public good is left for the determination of the legislative department of the government. The argument as to whether the legislature has acted wisely in formulating and passing such acts, must be addressed to the legislature and not to the Courts.

The authorities already cited, and many more which may be cited to the same effect from Courts of last resort from the different states clearly show that the act in question violates none of the constitutional privileges pointed out under the first three objections raised by the counsel for the petitioner, and no constitutional inhibitions can be found against these en-

actments, either in the state constitution of Ohio, or the Constitution of the United States.

Much more might be said upon this subject, but in view of the very able opinion rendered by the Court of Appeals, and the exhaustive argument made by counsel for Jones & Laughlins upon the same question, we do not wish to tax the patience of the Court longer by additional citations upon these points. It remains only to consider the fourth and last objection made to the law, to-wit, that it is obnoxious class legislation.

IV.

Counsel for the petitioner claim that the act in question is class legislation, which comes within the inhibition of the constitution. We have made a most thorough examination of the authorities, and we find but few cases in which counsel have had confidence enough in this point to raise it in the case of mechanics' liens, and in every case in which it was raised, the Courts have summarily brushed it aside as not being worthy of consideration.

If the act in question is class legislation, then all acts creating or establishing mechanics' liens are subject to the same objection. It seems to be generally admitted that the legislature has power over this subject. The authorities we have already cited seem to us to show conclusively the right of the legislature to enact the law in controversy, provided it has authority in any manner to legislate upon the subject of mechanics' liens.

In *Summerlin vs. Thompson et al.*, 31 Fla. 369, the Court say in the fifth paragraph of the syllabus,—

> "The act of 1887 (Chapter 3747) is not amenable to the objection that it is unconstitutional, because it confers special powers or special jurisdiction upon the Courts, or changes the general rule of practice in favor of a class."

The case which was before the Supreme Court of Florida for consideration, involved the constitutionality of a mechanics' lien law, and the same question was raised in regard to this being special or class legislation, as is made in the case now before this Court.

Mabry, Judge, in delivering the opinion of the Court, on page 389 says,—

> "The constitutionality of the act is questioned on the ground that so much of it as confers special powers or special jurisdiction upon the Courts, in favor of a class, is unconstitutional. It is not denied that all persons similarly situated are equally affected by the act. Counsel cites no authority to sustain the position assumed. It is not tenable. Further discussion of it is unnecessary."

Only two other cases have been brought to our attention in which counsel have raised this point. They are the cases of,—

Davis vs. The State, 3 Lea, (Tenn.) 380, and
Cole Mfg. Co. vs. Falls, 90 Tenn. 471,

already cited under another paragraph of this brief.

This subject, however, has been ably and fully discussed by this Court, and many of the Courts of last resort in the different states, and lawyers and Courts throughout the United States seem to concede that legislation upon the subject of mechanics' liens is not open to the objection raised by counsel in this case.

In *Budd vs. New York*, 143 U. S. 517, this Court held that an act of the legislature of the State of New York, regulating the rates applied to charges for elevating grain, popularly known as the elevator cases, which applied only to cities having a population of 130,000 or more, was not an infringement of the citizens' constitutional rights.

The following statement appears in the syllabus:—

> "An act of the legislature of New York (Laws of 88, Chapter 581) providing that the maximum charge for elevating, receiving, weighing and discharging grain, should not exceed five-eights of one cent a bushel, and that in the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, should only be required to pay the actual costs of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading; held,—that the act was a legitimate exercise of the police power of the state over a business affected with a public interest, and did not violate the Constitution of the United States, and was valid.

"The case of *Munn vs. Illinois*, 94, U. S. 113, reviewed and adhered to, and its application in cases decided in the State Courts considered.

"The decision in Chicago etc. *Railway Co. vs. Minnesota*, 134 U. S. 418, explained.

"Although the act of New York did not apply to places having less than 130,000 population, it did not deprive persons owning elevators in places of 130,000 population, or more, of the equal protection of the laws."

In *Wunderle vs. Wunderle*, 144 Ill. 40, the question of class legislation is discussed and the term defined.

In that case the Supreme Court of Illinois hold that the alien land law, which forbids the transfer of title etc., of land to non-resident aliens, although under treaties with some foreign states, it could only apply to certain classes of non-resident aliens, is a valid enactment.

The Court say in the twenty-ninth paragraph of the syllabus,—

"Laws are general and uniform when alike in their operation upon all persons in the like situation, and the fact of their being general and uniform, is not affected by the number of those within the scope of their operation."

In *Hing vs. Crowley*, 113 U. S. 703, Justice Field, in delivering the opinion of the Court, on page 708 says,—

"The specific regulations for one kind of business, which may be necessary for the protection

of the public, can never be the just grounds of complaint, because like restrictions are not imposed upon another business of a different kind. The discriminations which are open to objections are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right, which all can claim in the enforcement of the laws."

See also,—

Cooley's Constitutional Limitations, 5th Ed., 482-483.

See also the language of Justice Field in *Barbier vs. Connelly*, 113 U. S. 27, on pages 31 and 32 of the opinion of the Court.

The provision of the constitution invoked by the petitioner in this case is clearly and elaborately discussed by Judge McIlvaine in *State vs. Powers*, 38 O. S. 54. We call especial attention to the opinion on pages 62 and 63, and the authorities there cited.

We call especial attention to the cases of,—

Barbier vs. Connelly, 113 U. S. 27, 31–32.
Kidd vs. Pearson, 128 U. S. 1.
New York vs. Squire, 145 U. S. 175.

It is true the cases last cited are based upon the police power of the state, but the principles of law there enunciated, and the discussion as to what constitutes class legislation, are clearly applicable to the case at bar, and the police power as defined in these

cases, is certainly broad enough to cover our case.

We call attention to the decision of this Court in *Budd vs. New York*, 143 U. S. 517, already referred to. The enactment in that case was certainly open to all the objections raised against the act now in question, and this court held that the act was a legitimate exercise of the police power of the state over the business affected.

Many more authorities might be cited to the same effect, but it seems to us wholly unnecessary in view of the numerous decisions we have already cited upon other branches of the case, which also cover this phase of the case.

If the act in question is inhibited by the constitution because it is class legislation, then all mechanics' lien laws must fall under this ruling of the Court. We have found no authority nor any decision of any Court of last resort holding that such legislation is class legislation, and therefore within the inhibition of the constitution.

This case is submitted with the case of Jones & Laughlins, and counsel for Jones & Laughlins have prepared a full argument upon the subject in their brief, and have cited many of the authorities. We have endeavored to call especial attention to those decisions not fully considered in their brief, although we rely upon, and have cited all or a greater part of the authorities cited by them.

In conclusion, we desire to call esepecial attention to the opinion of the Circuit Court of Appeals deliv-

ered by Judge Lurton, which contains a full, clear and fair exposition of the law applicable to this case, and a very learned discussion of the constitutional principles raised, and although expressing regret at their inability to agree with the Supreme Court of Ohio, the Court of Appeals upholds the constitutionality of the law, and overrules the demurrer.

Respectfully submitted,

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LOUIS G. ADDISON.
Attorneys for Sosman & Landis.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, PETITIONER,

vs.

BENJAMIN F. JONES ET AL.

SUPPLEMENTAL MEMORANDA FOR RESPONDENTS.

TALFOURD P. LINN,
Of Counsel for Respondents.

(17,296.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-24-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 210.

THE GREAT SOUTHERN FIRE-PROOF HOTEL COMPANY, PETITIONER,

vs.

BENJAMIN F. JONES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Supplemental Memoranda for Respondents.

The action in this case is not brought by individuals, but by an association of individuals doing business as Jones & Laughlins, Limited. The bill avers that the association is one formed under and in accordance with the provisions of an act of the General Assembly of the State of Pennsylvania entitled "An act authorizing the formation of a partnership association in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances."

The date of the act, as set out in the bill, is given as June

23, 1874, as appears by the record. This date by mistake of the printer or some one else is incorrect, the proper date being June 2, 1874. The act will be found in the Session Laws of Pennsylvania for 1874, on page 271, and is the only act of 1874 referring to limited partnership associations. This act, together with its amendments and supplements, will be found in the Revised Statutes of Pennsylvania, page 1086. By paragraph 16 of the act as found in the Revised Statutes, such associations are given the right to sue and be sued in the association named.

Paragraph 197 of the constitution of Pennsylvania provides that "The term 'corporations' as used in this article shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships" (Rev. Stats. Pa., p. 48).

The bill avers that complainant association is and was at all times mentioned in the bill a citizen of the State of Pennsylvania. Under the acts quoted above and the provision of the constitution referred to, this averment of citizenship was sufficient, the complainant association being, within the meaning of the statute, a corporation, in so far as such allegation of citizenship is concerned. The exact status of associations similar to that of complainant and organized under the same law is discussed and considered in Coal Company *vs.* Rogers, 108 Pa. State, 147.

That corporations are citizens within the meaning of the statute requiring proper citizenship of parties to confer jurisdiction upon the Federal courts is settled in many cases. (See Railway Co. *vs.* Whittner, 13 How., 270; Louisville R. R. Co. *vs.* Letson, 2d How., 497; also notes to sec. 152, Garland & Ralston's Federal Practice.)

Should the court be of opinion that the complainant association is not under the laws of Pennsylvania a citizen, but that it should be considered in the light of a general

partnership, we still think the allegations of the bill as to citizenship are sufficient to confer jurisdiction.

In Express Co. *vs.* Kountze Bros., 8 Wall., 342, the declaration (see p. 347) described plaintiffs as "an association of persons carrying on the banking business in Omaha, Nebraska." This was held to be a sufficient averment of citizenship.

The bill here not only asserts that the association complainant was a citizen of Pennsylvania, but sets out the names of all of its members and shareholders and alleges their office and place of business to have been in Pennsylvania.

Should the court, however, be of opinion that the bill, under no view that may be taken of it, sufficiently alleges diverse citizenship so as to confer jurisdiction, then we submit that in view of the fact that counsel for petitioners have not at any stage of the proceedings in any way objected to the jurisdiction of the court upon this or any other ground, and in further view of the fact that neither the circuit court nor the circuit court of appeals have intimated or considered any such objection, the complainant should be permitted, within the rule established in Robertson *vs.* Cease, 97 U. S., 646, to amend its complaint as to citizenship, the fact of such citizenship, both of the association and all of its members, being undisputed, and that the proper order allowing such amendment should be transmitted to the circuit court where the action was commenced.

At the request of counsel for cross-petitioner, Sossman & Landis, we suggest to the court that inasmuch as no such objection is urged as to jurisdiction in their case, the principal questions argued should be decided by the court as between them and the petitioner herein, irrespective of the judgment of the court as to jurisdiction in the case of Jones & Laughlins, Limited.

TALFOURD P. LINN,
Of Counsel for Respondents.

the litigation, to be one by or against citizens of the State creating the corporation. It is not sufficient that the association may be described as a *quasi* corporation or as a "new artificial person." The rule does not embrace a new artificial person that is not a corporation.

Under the circumstances disclosed by the record the Circuit Court should allow an amendment of the pleadings upon the subject of the citizenship of the parties, and the case should proceed to a final hearing on the merits in the event the pleadings as amended show a case within the jurisdiction of the court.

THE case is stated in the opinion of the court.

Mr. John E. Sater and *Mr. D. F. Pugh* for petitioner.

Mr. Talfourd P. Linn and *Mr. Louis G. Addison* for respondents.

MR. JUSTICE HARLAN delivered the opinion of the court.

The bill in this suit, commenced in the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, describes the plaintiffs Benjamin F. Jones, George M. Laughlins, Henry A. Laughlins, Jr., and Benjamin F. Jones, Jr., as "members of the limited partnership association doing business under the firm name and style of Jones & Laughlins, Limited, which said association is a limited partnership association, organized under an act of the General Assembly of Pennsylvania, approved June 23d [2d], 1874, entitled 'An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances,'" and who "have their office and principal place of business in the city of Pittsburg," and which association is "a citizen of the State of Pennsylvania." Penn. Laws, 1874, p. 271.

The defendant first named in the bill is the Great Southern Fire Proof Hotel Company, a corporation of the State of Ohio; and some of the defendants are corporations and citizens of States other than the State of Pennsylvania.

The remaining defendants are thus described in the bill:

"Taylor, Beall & Company is a partnership doing business in

the city of Columbus and State of Ohio, the individual partners thereof being William D. Taylor, James P. Beall and William J. Keever."

"Sturgeon, Ford & Company is a partnership doing business in the city of Columbus and State of Ohio, the individual partners thereof being unknown to your orators."

"Meacham & Wright is a partnership doing business in the city of Columbus and State of Ohio, the individual partners thereof being Floras D. Meacham and Frank S. Wright."

"Sosman & Landis is a partnership of Chicago, Illinois, doing business in the State of Ohio, the names of the individual partners thereof being unknown to your orators."

"Dundon & Bergin is a partnership doing business in the city of Columbus, State of Ohio, the individual partners thereof being Thomas J. Dundon and Matthew J. Bergin."

"H. C. Johnson & Company is a partnership doing business in the State of Ohio, the names of the individual partners thereof being unknown to your orators."

"Schoedinger, Fearn & Company is a partnership doing business in the State of Ohio, the individual partners thereof being F. O. Schoedinger, W. A. Fearn and J. R. Dickson."

"L. Hiltgartner & Sons is a partnership doing business in the city of Columbus, State of Ohio, the names of the individual partners thereof being unknown to your orators."

The nature of the case made by the bill is as follows:

By written agreement between Jones & Laughlins, Limited, and W. J. McClain, dated December 13, 1894, the former agreed, upon certain terms, to furnish structural steel for use in the erection of the Great Southern Hotel at Columbus, for the construction of which McClain had previously contracted with the Great Southern Fire Proof Hotel Company. Under the above contract Jones & Laughlins, Limited, shipped and furnished to McClain structural steel of the value of $43,296.74. All of that sum was paid by McClain except $11,410.02, which was due to the plaintiffs with interest from January 28, 1896.

On the 11th day of August, 1896, McClain executed a deed of assignment for the benefit of his creditors. And on the 21st day of April, 1896, within four months after the above mate-

rials were delivered to McClain, Jones & Laughlins, Limited, filed with the recorder of Franklin County, Ohio, an affidavit containing an itemized statement of the amount and value of such materials. The object of the filing was to conform to the provisions of sections 3184 (as amended April 13, 1894, 91 Ohio Laws, 135) and 3185 of the Revised Statutes of Ohio, both sections relating to mechanics' liens, and thereby obtain, in behalf of Jones & Laughlins, Limited, for the amount due them, a lien upon the hotel and the opera house connected with it, as well as upon the land on which they stood.

After stating that the defendants each claim to have some interest in the property in question as lienholders or otherwise, the exact nature and extent of which was unknown to the plaintiff, the relief asked was: 1. That the defendants be required to answer and fully set forth their respective interests in the property, and failing to do so that they be barred from asserting any claim thereto. 2. That a receiver be appointed to collect rents. 3. That the plaintiff's demand be declared a valid and subsisting lien on the property. 4. That all the liens be marshalled, the premises sold, and the proceeds distributed.

The Great Southern Fire Proof Hotel Company demurred generally to the bill as insufficient.

The defendants Sosman & Landis filed their answer and cross-bill, claiming a lien upon the property for a balance due under a contract made between them and McClain pursuant to which they furnished scenery, stage work and fixtures for the improvements contemplated by the contract between McClain and the Hotel Company. To that cross-bill a demurrer was also filed.

The cause was heard in the Circuit Court upon the demurrers, the only question argued being the constitutionality of the Ohio statute of April 13, 1894. That court sustained the demurrers and dismissed the bill and cross-bill upon the ground that the provisions of the mechanic's lien law of Ohio, under which the plaintiffs and cross-plaintiffs proceeded, were unconstitutional. 79 Fed. Rep. 477.

Upon appeal to the Circuit Court of Appeals the decree of

the Circuit Court was reversed — the former court holding that the statute of Ohio in question was not void. 58 U. S. App. 397. The Hotel Company then applied for and obtained this writ of certiorari.

The bill rests the jurisdiction of the Circuit Court upon the ground of the diverse citizenship of the parties. But was the case as presented by the record one of which the Circuit Court of the United States could take cognizance by reason of diversity of citizenship? When this question was suggested at the argument counsel responded that no objection had been urged to the jurisdiction of that court. But the failure of parties to urge objections of that character cannot relieve this court from the duty of ascertaining from the record whether the Circuit Court could properly take jurisdiction of this suit. In *Mansfield &c., Railway Co.* v. *Swan*, 111 U. S. 379, 382, the court, after observing that the jurisdiction of a Circuit Court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record, *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 283; *Robertson* v. *Cease*, 97 U. S. 646, said: "The rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron* v. *Van Noorden*, 2 Cranch, 126, decided in 1804, where a judgment was reversed, on the application of the party against whom it had been rendered in the Circuit Court, for want of the allegation of his own citizenship, which he ought to have made to establish the jurisdiction which he invoked. This case was cited with approval by Chief

Justice Marshall in *Brown* v. *Keene*, 8 Pet. 112." These rules have been recognized and applied in numerous cases.[1]

We are of opinion that the plaintiff as a limited partnership association was not entitled to invoke the jurisdiction of the Circuit Court. It was not alleged to be, nor could it have alleged that it was, a corporation in virtue of the statute of Pennsylvania under which, according to the averments of the bill, it was organized. In *Lafayette Ins. Co.* v. *French*, 18 How. 404, 405, which was an action brought by citizens of Ohio in the Circuit Court of the United States for the District of Indiana, the declaration described the defendant as the "Lafayette Insurance Company, a citizen of the State of Indiana." This court said: "This averment is not sufficient to show jurisdiction. It does not appear from it that the Lafayette Insurance Company is a corporation; or if it be such, by the law of what State it was created. The averment that the company is a citizen of the State of Indiana can have no sensible meaning attached to it. This court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a State within the meaning of the Constitution. And, therefore, if the defective averment in the declaration had not been otherwise supplied, the suit must have been dismissed." The case of *Chapman* v. *Barney*, 129 U. S. 677, 682, is decisive of the present question. That was an action in the Circuit Court of the United States by the United States Express Company. This court said: "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the State of New York, and is a citizen

[1] *Hancock* v. *Holbrook*, 112 U. S. 229, 231; *Thayer* v. *Life Asso.*, 112 U. S. 717, 720; *Ayers* v. *Watson*, 113 U. S. 594, 598; *King Bridge Co.* v. *Otoe Co.*, 120 U. S. 225, 226; *Metcalf* v. *Watertown*, 128 U. S. 586, 587; *Morris* v. *Gilmer*, 129 U. S. 315, 325; *Chapman* v. *Barney*, 129 U. S. 677, 681; *Stevens* v. *Nichols*, 130 U. S. 230; *Graves* v. *Corbin*, 132 U. S. 571, 590; *Parker* v. *Ormsby*, 141 U. S. 81, 83; *Martin* v. *B. & O. R. R. Co.*, 151 U. S. 673, 689; *Mattingly* v. *N. W. Va. R. R. Co.*, 158 U. S. 53, 57; *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 98.

of that State. But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint stock company—that is, a mere partnership. And although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a Federal court. The company may have been organized under the laws of the State of New York, and may be doing business in that State, and yet all the members of it may not be citizens of that State. The record does not show the citizenship of Barney or of any of the members of the company. They are not shown to be citizens of some State other than Illinois. *Grace* v. *American Central Ins. Co.*, *supra*, and authorities there cited. For these reasons we are of opinion that the record does not show a case of which the Circuit Court could take jurisdiction."

The case of *Express Co.* v. *Kountze Bros.*, 8 Wall. 342, 351, to which attention is called by a supplementary brief, does not announce a different rule. The declaration in that case, singularly enough, described the defendant company as a "foreign corporation, formed under and created by the laws of the State of New York." Looking at the allegations of the pleadings, and there being no evidence to the contrary, this court held that the averment as to the citizenship of the defendant was sufficient, observing: "It is alleged that the United States Express Company, the defendant in the suit, is a foreign corporation formed under and created by the laws of the State of New York. The obvious meaning of this allegation is that the defendant is a citizen of the State of New York."

It has been suggested that the plaintiffs are entitled to sue, and may be sued, by their association name. 1 Brightly's Purdon's Digest, Pa. (12th ed.), 1088, Title Joint Stock Companies, § 16. But the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its cor-

GREAT SOUTHERN FIRE PROOF HOTEL COMPANY *v.* JONES.

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 210. Argued March 21, 22, 1900. — Decided April 9, 1900.

On writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.

A limited partnership, doing business under a firm name, and organized under the act of the General Assembly of Pennsylvania approved June 2, 1874, entitled "An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances," is not a corporation within the rule that a suit by or against a corporation in a court of the United States is conclusively presumed, for the purposes of

porate name in a court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation. *Louisville, Cincinnati & Charleston Railroad Co.* v. *Letson*, 2 How. 497; *Ohio & Miss. R. R. Co.* v. *Wheeler*, 1 Black, 286; *Steamship Co.* v. *Tugman*, 106 U. S. 118, 120. The rule that for purposes of jurisdiction and within the meaning of the clause of the Constitution extending the judicial powers of the United States to controversies between citizens of different States, a corporation was to be deemed a citizen of the State creating it, has been so long recognized and applied that it is not now to be questioned. No such rule however has been applied to partnership associations although such associations may have some of the characteristics of a corporation. When the question relates to the jurisdiction of a Circuit Court of the United States as resting on the diverse citizenship of the parties we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association.

Nor can we accede to the suggestion that this question of jurisdiction is affected by the clause of the Constitution of Pennsylvania providing that the term "corporations," as used in article XVI of that instrument, "shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships." Const. Pa. art. XVI, § 13. The only effect of that clause is to place the joint stock companies or associations referred to under the restrictions imposed by that article upon corporations; and not to invest them with all the attributes of corporations.

We have not been referred to any case in the Supreme Court of Pennsylvania which distinctly places limited partnership associations, created under the statutes of that State, on the basis of corporations. "Such an association," that court said in *Coal Co.* v. *Rogers*, 108 Penn. St. 147, 150, "is not technically a corporation, yet it has many of the characteristics of one," and "it may not be improper to call such an association a *quasi* corporation." In *Hill* v. *Stetler*, 127 Penn. St. 145, 161, referring to the act of June 2, 1874, the court said that it provided for the

creation of "a new artificial person to be called a joint stock association, having some of the characteristics of a partnership and some of a corporation."

In *Carter* v. *Producers' Oil Co., Ltd.*, 182 Penn. St. 551, 573, 574, which involved the validity of a rule adopted by a limited partnership association organized under the Pennsylvania statute of June 2, 1874, and its supplements, and which rule prohibited any person who acquired the capital stock of a member from exercising the privileges of a member, unless he was elected as such, the court said: "We cannot assent to the plaintiff's claim that the defendant company is a corporation and restricted, in the adoption of by-laws, rules and regulations for its government, to such as it is within the power of the latter to prescribe. It may be conceded that the defendant company has some of the qualities of a corporation, but it is, nevertheless, a partnership association, governed by the statutes and articles under which it was organized, and the rules and regulations it may prescribe in execution of the power with which the statutes have invested it."

That a limited partnership association created under the Pennsylvania statute may be described as a "*quasi* corporation," having some of the characteristics of a corporation, or as a "new artificial person," is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations.

We have not overlooked the case of *Andrews Bros. Co.* v. *Youngstown Coke Co.*, 58 U. S. App. 444, in which the Circuit Court of Appeals for the Sixth Circuit, speaking by Judge Lurton, held that limited partnership associations organized under the Pennsylvania statute were corporations within the jurisdictional requirement of diverse citizenship. For the reasons stated, we are unable to concur in the view taken by that court.

We therefore adjudge that as the bill does not make a case arising under the Constitution and laws of the United States, it was necessary to set out the citizenship of the individual members of the partnership association of Jones & Laughlins, Limited, which brought this suit.

Another question as to jurisdiction arises on the record. The citizenship of the members of the several partnerships that are named as defendants does not appear from the pleadings or otherwise. An allegation as to the State in which those firms were doing business is not sufficient to show the citizenship of the individual partners. The relief sought is the marshalling of all the lien debts on the hotel and the opera house of the Great Southern Fire Proof Hotel Company, the sale of the property, and the distribution of the proceeds among the parties according to their respective rights. As no allusion was made to this matter at the argument before us, we do not now express any opinion upon the question whether the citizenship of the individuals composing the defendant partnerships doing business in Ohio is material to the jurisdiction of the Circuit Court. We leave that to be determined by the court below, if an application be made to amend the pleadings as to the citizenship of the parties.

Without considering the merits of the case, we are constrained to reverse the judgments of the Circuit Court of Appeals and of the Circuit Court, and remand the cause for further proceedings consistent with this opinion. Under the circumstances, the plaintiffs should be allowed, upon application, to amend the bill upon the subject of the citizenship of the parties. If the amendment shows a case within the jurisdiction of the Circuit Court, the parties should be permitted to proceed to a final hearing; otherwise, the bill should be dismissed at the plaintiffs' costs without prejudice to another suit in a court of competent jurisdiction.

Reversed.